No. 97-1909-CFX Title: Murphy Brothers., Inc., Petitioner
v.
Michetti Pipe Stringing, Inc.

Docketed:
May 28, 1998 Court: United States Court of Appeals for the Eleventh Circuit

See also:
98-1420

Entry	Date	Proceedings and Orders
	May 26 1998	Petition for writ of certiorari filed. (Response due July 12, 1998)
	Jun 22 1998	Order extending time to file response to petition until July 12, 1998.
	Aug 5 1998	DISTRIBUTED. September 28, 1998
	Aug 21 1998	Response requested.
	Sep 21 1998	Brief of respondent Michetti Pipe Stringing, Inc. in opposition filed.
	Oct 7 1998	REDISTRIBUTED. October 30, 1998
	Nov 2 1998	Petition GRANTED. SET FOR ARGUMENT March 1, 1999. **********
	Dec 11 1998	Order extending time to file brief of petitioner on the merits until December 22, 1998.
	Dec 15 1998	Joint appendix filed.
	Dec 17 1998	Brief amicus curiae of United States filed.
	Dec 22 1998	Brief of petitioner Murphy Bros., Inc. filed.
	Dec 22 1998	Brief amicus curiae of Prooducts Liability Advisory Council, Inc. filed.
	Dec 22 1998	Brief amicus curiae of Defense Research Institute filed.
	Dec 22 1998	Brief amicus curiae of AFL/CIO filed.
	Jan 13 1999	Order extending time to file brief of respondent on the merits until January 27, 1999.
	Jan 14 1999	CIRCULATED.
	Jan 19 1999	Record filed.
	Jan 19 1999	Record filed.
	Jan 27 1999	Brief of respondent Michetti Pipe Stringing, Inc. filed.
	Feb 19 1999	Reply brief of petitioner Murphy Bros., Inc. filed.
	Mar 1 1999	ARGUED.

1pp

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MURPHY BROS., INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS
RIVES & PETERSON
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

May 1998

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

47 pp

QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the court of appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any non-wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

Murphy Bros., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. A-1 - A-6) is reported at *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997). The opinion of the United States District Court for the Northern District of Alabama (App. A-8 - A-10) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 24, 1997. (App. A-1). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on February 23, 1998. (App. A-11 - A-12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, section 1446(b) provides, in pertinent part:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

STATEMENT OF THE CASE

Michetti Pipe Stringing, Inc. ("Michetti") filed this suit in the Circuit Court of Jefferson County, Alabama on January 26,

1996, seeking damages for breach of contract and fraud against Murphy Bros., Inc. ("Murphy"). The case arises out of a dispute over payment for additional work allegedly performed by Michetti pursuant to a construction contract with Murphy.

A. The Negotiations

For many weeks prior to the filing of this suit, the parties had engaged in conversations and discussions attempting to resolve their dispute. These conversations and discussions were conducted between Murphy's Vice President - Risk Manager, Rick Moskowitz, and counsel for Michetti, J. David Pugh, Esq.

On January 29, 1996, in the midst of the negotiations, counsel for Michetti sent a letter, via facsimile transmission, to Rick Moskowitz and attached a "courtesy copy" of the complaint Michetti had filed on January 26, 1996 in the Circuit Court of Jefferson County, Alabama. The letter advised Moskowitz that Michetti had filed the complaint, but asked that he "[p]lease understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies." Counsel stated that "Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation." Counsel continued: "Accordingly, we are providing a courtesy [copy] of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter." [R1-5-Ex. A]. The parties continued their negotiations until February 12, 1996, when Murphy was served with process and refused to negotiate further.

B. Proceedings Below

Service of process was perfected on Murphy via certified mail on February 12, 1996. [R1-6-1]. On March 13, 1996, Murphy removed the action to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1441. [R1-6-1]. The jurisdiction of the district court was invoked

under 28 U.S.C. § 1332 based on diversity of citizenship, Michetti being a Canadian company with its principal place of business in Nisku, Alberta, Canada and Murphy being an Illinois corporation with its principal place of business in East Moline, Illinois.

On April 3, 1996, Michetti moved to remand the case to state court. Michetti argued that pursuant to the plain meaning of 28 U.S.C. § 1446(b) the time for removal begins to run from the defendant's "receipt ... through service or otherwise" of a copy of the complaint and that the removal was untimely because it was not filed within thirty days after Murphy received the courtesy copy of the complaint via facsimile. [R1-5-1].

The district court denied the motion to remand, concluding that the removal period commenced when Murphy was served with process. (App. A-7) The court agreed with *City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), quoting:

> The 1949 addition [to section 1446(b)] supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served [a]long with the summons (Ala. R. Civ. P. 4).

(App. A-10). The district court determined that the removal was timely because it was filed within thirty days after service of process. (App. A-7).

The district court granted Michetti's motion to certify the issue for interlocutory appeal to the United States Court of

Appeals for the Eleventh Circuit in an order dated May 1, 1996. (App. A-13 - A-14). That certification was renewed on September 17, 1996. (App. A-15 - A-16). The court of appeals granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b) by order dated December 5, 1996. (App. A-17).

On October 24, 1997, the court of appeals reversed the district court. *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997). The court of appeals rejected the district court's conclusion that the "or otherwise" language of the statute was not intended to have any effect in states where a copy of the complaint must be delivered when service of process is effected, finding that the meaning of the statute was clear. The court stated:

> An interpretation that started the clock running before the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice in all the States." And the stated intent for the 1948 amendments was to make practice identical from state to state; making other states different from New York thwarts that intention. So the plain meaning stands.

(App. A-5). The court concluded that "the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means." (App. A-3) The court held that the time period for removal in this case commenced

when the faxed, courtesy copy of the complaint was received by Mr. Moskowitz on January 29, 1996, and that the notice of removal, filed forty-four days later, was untimely. (App. A-3). The court reversed and remanded the case with instructions to the district court to remand the action to state court. (App. A-6).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Results in a Departure from the Accepted and Usual Course of Judicial Proceedings.

The "receipt rule"[1] adopted by the court of appeals in this case results in a radical departure from the accepted and usual course of judicial proceedings. Historically, service of process has been understood to be the procedural event that allows the court to exercise personal jurisdiction over a defendant and which triggers the defendant's obligation to take action in response to the allegations of the complaint. Consequently, a party named as a defendant need take no action in response to a complaint until he has been joined as a party defendant by service of process. His liabilities cannot be determined, nor his rights prejudiced before he has been served. The receipt rule runs counter to these accepted principles.

Under the receipt rule, if a party named as a defendant "receives" a copy of the complaint, by any means and from any source, he must remove the case within 30 days or forever lose his right to a federal forum. This is true regardless of whether service of process has been perfected, or even attempted, at the time the complaint is "received" or whether service ever could

[1] The conflicting views expressed in the two lines of cases that have developed on this issue have come to be known as the "receipt rule" and the "service rule." The "receipt rule" cases hold that the removal period runs from the date the named defendant receives a copy of the complaint, from whatever source, regardless of whether service of process has then been perfected. The "service rule" cases, by contrast, hold that the time period for removal does not begin to run from receipt of the complaint if receipt occurs prior to service of process (or stated another way, that service of process is a necessary prerequisite to the commencement of the time period for removal). Compare *Tyler v. Prudential Insurance Co.*, 524 F. Supp. 1211, 1214 (W.D. Pa. 1981)(receipt rule) with *Love v. State Farm Mutual Automobile Ins. Co*, 542 F.Supp. 65 (N.D. Ga. 1982)(service rule).

be perfected. Whether the party received the complaint via facsimile as a "courtesy" from plaintiff's counsel, as in this case, or he stumbled upon it lying in the gutter outside the courthouse, the receipt rule requires that he remove within 30 days or lose his right to do so. Thus, contrary to the accepted and usual course of proceedings, whereby a defendant need not take any action prior to service in order to protect his rights, applying the receipt rule, a named defendant who receives a copy of the complaint must take action prior to service to preserve his rights. His rights can be prejudiced -- he can forever lose his right to remove -- even prior to the time he is made a party defendant by service of process.[2]

The lower courts have struggled with this issue, and a clear split of authority exists in the district courts.[3] Appellate review

[2] The receipt rule also allows plaintiffs, by providing a "courtesy" copy of the complaint to defendants prior to service, to try to trap unwary defendants into waiving their right to remove. See, e.g. *Carter v. Building Material and Construction Teamsters' Union Local 216*, 928 F.Supp. 997 (N.D. Cal. 1996)("courtesy" copy sent on November 17, 1995 with request for settlement discussions; service perfected February 26, 1996; March 18, 1996 removal held untimely under receipt rule). "[T]he Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts in proper cases to retain their own jurisdiction." *Wecker v. Nat'l Enameling and Stamping Co.*, 204 U.S. 176, 186 (1907).

[3] See, e.g., *Kelly v. Dolgen Corp., Inc.*, 972 F. Supp. 1470 (M.D. Ga. 1997)(service rule); *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266 (W.D. Wis. 1997)(receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D. S.C. 1996)(service rule); *Speilman v. Standard Insurance Company*, 932 F. Supp. 246 (N.D. Cal. 1996)(receipt rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D. Mo. 1996) (service rule); *City National Bank of Sylacauga v. Group Data Services*, 908 F.Supp 896 (N.D. Ala. 1995)(service rule); *Gates Construction Corp. v. Koschak*, 792 F. Supp. 334 (S.D.N.Y. 1992)(receipt rule); *Barratt v. Phoenix Mutual Life Insurance Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992)(service rule); *Pillin's Place, Inc. v.*

(Footnote 3 continued on next page)

of this issue is rare because of the procedural roadblocks to review of removal issues. The decision of a district court to remand a case as untimely removed is "not reviewable on appeal or otherwise." *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). The standards for obtaining interlocutory review under 28 U.S.C. § 1292(b) are stringent. As a result of these roadblocks to securing appellate review, trial courts rarely obtain guidance from the courts of appeals on this issue. In fact, since section 1446(b) was amended almost 50 years ago to add the receipt-by-service-or-otherwise language at issue herein, only three other appellate courts have addressed the issue, and all of those cases have been decided in the last five years. See *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839 (5th Cir. 1996); *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994); *Tech Hills II Assocs v. Phoenix Home Life Mut. Insurance Co.*, 5 F.3d 963 (6th Cir. 1993). The opportunities for this Court to review the issue are even rarer. Indeed, this is the first time this Court has been asked to consider this issue.[4] Consequently, the Court should seize the opportunity presented by this case to review this issue and exercise its supervisory jurisdiction in order to provide much needed guidance to the lower courts on this issue.

(Footnote 3 continued)

Bank One, Akron, N.A., 771 F. Supp. 205 (N.D. Ohio 1991)(receipt rule); *Bennett v. Allstate Ins. Co.*, 753 F. Supp. 299 (N.D. Cal. 1990)(service rule); *North Jersey Savings & Loan Association v. Fidelity and Deposit Co. of Maryland*, 125 F.R.D. 96 (D.N.J. 1988)(receipt rule); *Valentine Sugars, Inc. v. Phillips Petroleum Co.*, 1989 U.S.Dist. LEXIS 16028 (E.D. La. 1990)(service rule); *Love v. State Farm Mutual Automobile Ins. Co*, 542 F.Supp. 65 (N.D. Ga. 1982)(service rule); *Quick Erectors, Inc. v. Seattle Bronze Corp.*, 524 F. Supp. 351 (E.D. Mo. 1981)(service rule); *Tyler v. Prudential Insurance Co.*, 524 F. Supp. 1211, (W.D. Pa. 1981)(receipt rule).

[4] Review was not sought in this Court from any of the three other court of appeals' decisions addressing this issue.

II. The Decision of the Court of Appeals is Erroneous.

As the court of appeals accurately found, the plain meaning of a statute is conclusive except in the rare cases in which the "'literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982)). However, if the language of 28 U.S.C. § 1446(b) had a clear or plain meaning, as the court of appeals found, there would not be such a clear split of authority among the lower courts as to its meaning. See *supra*, n.2; *infra*, n.13. To conclude that the statute has a plain meaning requires "the narrowest of vision; the statutory language must be taken outside the context of the surrounding statute and the other removal statutes; the language must be analyzed apart from the legislative and case law history; and definitions of terms must not be questioned."[5] The statute's meaning cannot be ascertained in a vacuum[6]

---

[5] Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359, 370 (Winter 1992). See also *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D.Ala. 1990)("the words 'or otherwise' are so vague as to have no meaning")

[6] See *United States v. Thompson/Center Arms Co*, 504 U.S. 505, 516 n.8 (1992)("'A statute like any other living organism, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. ... The meaning of such a statute cannot be gained by confining inquiry within its four corners.")(quoting *United States v. Monia*, 317 U.S. 424, 432 (1943)(dissenting opinion)); *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) ("'It is well settled that in interpreting a statute, the court will look not merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...")(quoting *Brown v. Duchesne*, 19 How. 183 (1857)).

A. The court of appeals' interpretation of 28 U.S.C. § 1446(b) is not consistent with the legislative history of the statute or with the purpose of the 1949 amendment.

Prior to 1948, the time period for removal varied from state to state because it was tied to the time for responding to the complaint under state law. Concern for uniformity in the time period allowed for removal precipitated the 1948 amendment to section 1446(b) which required that removal take place within twenty days "after commencement of the action or service of process, whichever is later." 16 MOORE'S FEDERAL PRACTICE ¶ 107 App.01[1] (3d ed.). However, the 1948 amendment created inequities also. In states like New York where a case could be commenced by serving the defendant with a summons without filing or serving a complaint, the removal period could expire before the defendant even received a copy of the complaint from which he could determine whether the case was removable.

The 1949 amendment sought to correct these inequities by amending the statute to require removal within twenty days of defendant's receipt, by service or otherwise, of the initial pleading. The 1949 amendment implemented a minor change that was intended merely to toll the time for removal in those jurisdictions where the defendant did not have access to the complaint when he was served, in order to assure defendants in those jurisdictions the same twenty day time period to remove that defendants were afforded in other jurisdictions.[7] Nothing in the legislative history indicates that Congress intended this amendment to dispense

[7] The 1949 amendment included an alternative time period for removal. That alternative time period was added to deal with anticipated problems in jurisdictions where a suit could be commenced by filing a complaint, but service of process could be perfected simply by serving a summons alone. Committee Note to 1949 Amendments, reprinted in 16 MOORE'S FEDERAL PRACTICE ¶ 107 App. 02[2] (3d ed.).

with the need for service of process -- which had always been required before a defendant was obligated to exercise his right to remove.

The discussion of the legislative history of the statute contained in the Eleventh Circuit's opinion in this case reflects that the court misapprehended the real issue. The issue is *not* whether receipt replaced service of process as the event triggering the removal period throughout the country or only in New York. See (App. A-5). The issue is whether the adoption of the 1949 amendment abrogated service of process as a necessary prerequisite to the commencement of the removal period. In other words, was the amended statute intended to require both service and receipt. The court of appeals observes that making other states different from New York thwarts Congress's intent to make practice uniform. (App. A-5). To the contrary, retaining service of process as a prerequisite to removal does not make New York *different* from other states. It simply provides for uniformity on two levels -- service of process and receipt of the complaint -- both of which must occur to trigger the removal period. In most jurisdictions service and receipt occur simultaneously, but both are required in all jurisdictions. The historical context and legislative history demonstrate that the service requirement is inherent in the statute.

B. The receipt rule conflicts with other removal statutes.

Section 1441 (b) of the removal statutes provides that "any other such action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b) (emphasis supplied). According to this language, a "defendant" within the meaning of the removal statutes is "a party in interest [who has been] properly joined and served." Since the time period for removal does not begin to run until "receipt by the

defendant, through service or otherwise, of a copy of the initial pleading" and since a party is not a defendant until he has been properly joined and served, the time for removal cannot begin to run prior to service of process. Thus, the receipt rule cannot be the proper interpretation of section 1446(b).

Moreover, the interplay between section 1446(b) and section 1441(b) demonstrates that the receipt rule is at odds with Congress's intent. In determining whether a case is removable under 1441(b), only parties who are properly joined and served as defendants must be considered. However, in determining the time for removal under 1446(b) according to the receipt rule, all parties who have received a copy of the complaint must be considered. The majority view is that in suits naming multiple defendants, when the time period for removal begins to run for the first party, it begins to run for all the parties. See *Getty Oil Co. of Texas v. Ins. Co of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a][I] (3d ed.). But see *McKinney v. Bd of Trustees of Mayland Comm. College*, 955 F.2d 924, 926-28 (4th Cir. 1992). With the receipt rule in place, all defendants could lose their right to a federal forum based on the actions of a party who need not otherwise be considered in the removal equation.[8] Certainly, Congress did not intend this anomalous result. No such problems arise if service is required before the removal period commences.

---

[8] For example, the plaintiff might provide one of several named defendants with a "courtesy copy" of his complaint and later perfect service on the other defendants. The unserved defendant need not join in the removal or be considered in determining removability, but his early receipt of the complaint commences the running of the removal period for all the defendants. All the defendants can be deemed to have waived their rights to a federal forum because of inaction on the part of a party who need not even be considered in determining whether the case is removable, nor join in the removal petition.

C. The receipt rule cannot be harmonized with the Federal Rules of Civil Procedure.

Rule 81(c), governing procedures after removal, contains the same language as section 1446(b), requiring that a defendant respond to the complaint

> within 20 days after *receipt through service or otherwise of a copy of the initial pleading...*, or within 20 days after the service of a summons on such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever is longer.

FED. R. CIV. P. 81(c) (emphasis supplied). This language was added to Rule 81(c) contemporaneously with the addition of this same language to section 1446(b) and for the expressed purpose of making Rule 81(c) consistent with section 1446(b).[9] Logic dictates that the language "receipt, by service or otherwise, of a copy of the initial pleading" was intended to mean the same thing in both the statute and the rule.[10] If mere receipt of the initial

---

[9] The amendment to Rule 81(c) was effectuated shortly before the amendment to 28 U.S.C. § 1446(b). However, the Advisory Committee Notes to the proposed amendment to Rule 81(c) clearly show that the "service or otherwise" language was drawn directly from the proposed amendment to § 1446(b): "The need for revision of the third sentence of [Rule 81(c)] is occasioned by the procedure for removal set forth in revised title 28 U.S.C. § 1446 . . . The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment . . ." Committee Note of 1948 Advisory Committee's Proposed Amendment to Subdivision(c), reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81.01 [18] (2d ed. 1992).

[10] In *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994), the Seventh Circuit adopted the receipt rule based on the "plain meaning" of § 1446(b) without even considering the identical language in Rule 81(c). A year later the court was called upon to ascertain the meaning of the same language in Rule 81(c). *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995), *cert. denied*, 134 L.Ed.2d 522 (1996). The court refused to hold that that same language in the Rule, which was adopted at the same time and for the purpose of consistency,

(Footnote 10 continued on next page)

pleading is the proper interpretation of this language, as the court of appeals held, then a named defendant can be required to remove a case and to respond to the complaint without ever having been served with process pursuant to either state or federal law. Abrogation of the requirement of service of process, even if only in a limited number of cases, would be a profound change in procedure. Adoption of the receipt rule interpretation of the relevant language dictates the conclusion that such a profound procedural change was made without even a passing note or comment in the legislative history of the statute, the Supreme Court recommendation on adoption of the rule or the advisory committee comments to Rule 81(c). The absence of any such note or comment is a clear indication that the "receipt rule" interpretation of the operative language in 1446 (b) is not what was intended.[11]

Footnote 10 continued)

means mere receipt (as it had held with the statute). Rather, it found that service of process is required notwithstanding the receipt-by-service-or-otherwise language of the Rule. *Id.* at 1375 ("we perceive nothing in the statute, the rule or their respective legislative histories that would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process"). It is nonsensical to hold that language added to a statute and a rule in the same time period and for the purpose of consistency between the two was not intended to have the same meaning in each.

[11] See *Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 680 (D.Ariz. 1993)("Of course, it is conceivable that Congress might wish to establish a different standard, outside the boundaries of Rule 12, to govern response time in removed actions. It is unimaginable, however, that such a significant alteration in the Federal Rules of Civil Procedure would be effected without mention by the Advisory Committee, the Supreme Court, or Congress itself. And a careful examination of the legislative history of Rule 81(c) reveals not one iota of evidence that such a change ever was intended.")

The history and purpose of the 1949 amendment, the other removal statutes and the Rules indicate that service of process is a prerequisite to the commencement of the removal period. The requirement of service also provides a bright line test for determining the time for removal. In contrast, the receipt rule adopted by the Eleventh Circuit is inconsistent with the history and purpose of the statutory amendment and conflicts with the other removal statutes and the Rules. This Court should grant Murphy's petition to resolve the conflict among the lower courts and to correct the Eleventh Circuit's error.

III. The Question Presented is Important

This case presents an issue of exceptional importance to litigants and their counsel not heretofore considered by the Court. Virtually every time a potentially removable lawsuit is filed the defendants and their counsel must consider whether to seek removal and must confront the issue of determining when the notice of removal must be filed. The question presented in this case needs to be definitively resolved so that litigants and their counsel can determine with confidence what is required of them and to assure that defendants are not denied their right to a federal forum because of confusion in the law. (App. A-6) ("any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline").

Although the four circuit courts that have considered the issue have all adopted a receipt rule,[12] the district courts in the other

---

[12] As noted above, the reasoning of the Seventh Circuit in *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995), *cert. denied*, 134 L.Ed.2d 522 (1996) is fundamentally inconsistent with its reasoning in *Roe*, and it remains to be seen how this inconsistency will be resolved. Moreover, although the Sixth Circuit purported to adopt the receipt rule, it equated receipt to service by holding that the defendant received the complaint when it came into the hands of an agent authorized to accept service on behalf of the corporate defendant, which was at the time of service. See *Tech Hills*, 5 F.3d at 968.

circuits remain hopelessly divided on the issue.[13] Commentators likewise disagree.[14] Because of procedural bars to review of orders addressing this issue, another opportunity for this Court to provide a definitive interpretation of the statute is not likely to arise soon. "Nothing is more wasteful than litigation about where to litigate," *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting), and such litigation will continue to proliferate until this Court addresses the issue. As a result of the uncertainty in the law, defendants who have a right to a federal forum will continue to be denied that right either because the lower courts erroneously calculate the removal time based upon the receipt rule or because the defendants incorrectly calculate their removal time based on the service rule. This Court should resolve the uncertainty created by the conflicting interpretations of the statute.

---

[13] See, e.g., *Joiner v. Kaywal Transportation, Inc.*, 979 F. Supp. 1252 (W.D.Ark. 1997)(receipt rule); *Boyles v. Junction City Foundry, Inc.*, 1997 U.S.Dist.LEXIS 21876 (D.Kan. 1997)(receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D.S.C. 1996)(service rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D.Mo 1996)(service rule); *Speilman v. Standard Ins. Co.*, 932 F. Supp. 246 (N.D.Cal. 1996)(receipt rule); *Colegio de Ingenieros Y Agrimensores De Puerto Rico v. CNE Consulting, Inc.*, 896 F. Supp. 241 (D.P.R. 1995) (receipt rule); *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.Supp. 535 (E.D.Va. 1995)(receipt rule); *Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D.Ariz. 1993)(service rule); *Baratt v. Phoenix Mutual Life Ins. Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992)(service rule); *Gates Construction Corp. v. Kochak*, 792 F.Supp. 334 (S.D.N.Y. 1992)(receipt rule); *Greensmith Co. v. Bearden*, 796 F.Supp. 812 (D.N.J. 1992, receipt); *Hill v. City of Boston*, 706 F. Supp. 966 (D.Mass. 1989)(service rule).

[14] Compare Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992) with Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 Md.L.Rev. 374 (Winter 1993).

In summary, the decisions of the lower courts are in substantial conflict over the proper interpretation of 28 U.S.C. § 1446(b). The interpretation adopted by the court of appeals in this case is contrary to the legislative history and purpose of the statute and cannot be reconciled with the other removal statutes or with the Rules of Civil Procedure. This case presents a rare opportunity for the Court to address this issue of widespread importance and to bring much needed uniformity to this area.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS

RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Deborah Alley Smith, a member of the Bar of this Court, hereby certify that on this ____ day of May, 1998, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

J. David Pugh, Esq.
James F. Archibald, III, Esq.
Bradley, Arant, Rose & White LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent

I further certify that all parties required to be served have been served.

DEBORAH ALLEY SMITH
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

APPENDIX

INDEX TO APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC., a corporation
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC., a corporation
Defendant-Appellee

Oct. 24, 1997

Appeal from the United States District Court
for the Northern District of Alabama
(No. 96-CV-673-JFG), J. Foy Guin, Jr., Judge

Before COX and BARKETT, Circuit Judges, and HUNT[*], District Judge.

COX, Circuit Judge:

This interlocutory appeal presents a single issue: whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins when the defendant receives a copy of the plaintiff's initial pleading, or when the defendant is served with a copy of that pleading. Concluding that the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading, we reverse.

Background

Michetti Pipe Stringing, Inc. sued Murphy Bros., Inc. in Alabama state court. Within a few days of filing suit, Michetti's

---

*Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

counsel faxed a file-stamped copy of the complaint with a cover letter to Murphy's vice president for risk management. Murphy replied to the letter and acknowledged receipt of the complaint. Two weeks later, Michetti formally served Murphy by certified mail.

Murphy filed a notice of removal under 28 U.S.C. §1446(a) thirty days after the complaint had been served—but forty-four days after receiving the facsimile copy. Michetti moved the district court to remand the case to state court on the ground that the notice of removal was untimely. Citing district court precendent from Alabama and elsewhere in this circuit, the court denied the motion, but certified the order for interlocutory appeal, identifying the key question to be whether 28 U.S.C. §1446(b) embodies a "receipt rule" or a "service of process rule."

This court granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b). Michetti now invites us to follow the statute's plain language and hold that § 1446(b)'s thirty-day period runs from the defendant's receipt of the complaint. Murphy, on the other hand, points to both legislative history and fairness concerns in asking for a rule that the thirty-day clock starts to tick upon service. Murphy proposes that service for this purpose need not mean service that complies with state procedures, as long as the plaintiff intended it as service.[1] Because the question here is purely one of law, we review de novo the district court's denial of the motion to remand.[2]

Discussion

Section 1446, which governs the procedure for removal of a case from state to federal court, limits the period in which a defendant may exercise his removal right:

[1](Appellee's Br. at 6.)

[2]See Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 865 (11th Cir. 1997).

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .[3]

By and large, our analysis begins and ends with the three italicized words. The statute uses the word "receipt," not "service," to describe the action that starts the thirty-day clock. "Receipt" is the nominal form of "receive," which means broadly "to come into possession of" or to "acquire."[4] Attached to "receipt," the phrase "through service or otherwise" opens a universe of means besides service for putting the defendant in possession of the complaint. Limiting the triggering event to "service," on the other hand, would violate these words' broad meaning by trimming that universe down to a narrow spectrum of methods.

If a statute is clear, it means what it says.[5] We therefore join the other circuit courts that have confronted the issue and hold that the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means.[6] Here, the countdown began the day after the arrival of the faxed, file-stamped copy of the complaint in the hands of a responsible Murphy employee. The notice of removal came forty-four days later and was therefore untimely.

[3]28 U.S.C. § 1446(b) (1994) (emphasis added).

[4]Webster's Third New International Dictionary 1894 (1986).

[5]See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).

[6]See Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 841 (5th Cir. 1996); Roe v. O'Donohue, 38 F.3d 298, 303 (7th Cir. 1994); Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993).

The statute's clarity notwithstanding, two of Murphy's contentions merit further discussion. First, Murphy argues that this plain meaning contravenes the congressional intent reflected in the legislative history. It is true that "[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning."[7] But the phrase "receipt . . . or otherwise," as interpreted here, is not contrary to—or "demonstrably at odds" with, as the Supreme Court has put it[8]—the intent Murphy divines from the legislative history.

That history is as follows: before 1948, a defendant could remove a case at any time when, under state procedure, he could file a responsive pleading.[9] To homogenize practice from state to state, in 1948 Congress amended § 1446 to add a twenty-day (later thirty) deadline that ran from service of process.[10] A problem arose, however, in states such as New York where service of process could precede filing and service of the complaint. In these states, a defendant's removal time could expire before he saw the complaint and knew whether it contained a removable claim.[11] In 1949, Congress amended § 1446 to the present "by receipt . . . or otherwise" language in order to

[7]Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995) (citing Hallstrom v. Tillamook Co., 493 U.S. 20, 28-30, 110 S.Ct. 304, 310, 107 L.Ed.2d 237 (1989)); see Demarest v. Manspeaker, 498 U.S. 184, 190, 111, S.Ct. 599, 604, 112 L.Ed.2d 608 (1991).

[8]Demarest, 498 U.S. at 190, 111 S.Ct. at 604 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982).)

[9]Tech Hills II, 5 F.3d at 967.

[10]Act of June 25, 1948, ch. 646, § 1446(b), 62 Stat. 869, 939 (1948).

[11]Robert P. Faulkner, The Courtesy Copy Trap, 52 Md. L.Rev. 374, 393-94 (1993).

eliminate this problem.[12] From this history, Murphy argues that the "receipt . . . or otherwise" language was not meant to have any effect outside of states like New York. Therefore, Murphy concludes, only in New York did receipt replace service as the triggering event.

The legislative history does not lead to that result. There were undoubtedly narrower ways of solving the New York problem than changing the triggering event from service to receipt. That does not mean, however, that the result in this case is necessarily "at odds" with what Congress meant to do. An at-odds reading "thwart[s] the obvious purpose of the statute."[13] An interpretation that started the clock running before the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice in all the States."[14] And the stated intent for the 1948 amendments was to make practice identical from state to state;[15] making other states different from New York thwarts that intention. So the plain meaning stands.

[12]Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 88, 101 (1949); see H.R.Rep. No. 81-352 (1949), reprinted in 1949 U.S.C.C.A.N. 1254, 1268.

[13]Commissioner v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

[14]S.Rep. No. 81-303 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1254 (emphasis added).

[15]See H.R.Rep. No. 80-308 (1948), reprinted in 1948 U.S.C.C.A.N. spec. pamphlet at A135-36.

Murphy's second contention is that a receipt rule invites abuse by perfidious plaintiff's counsel, who will, Murphy claims, set "courtesy copy traps" for unwary defendants—in extreme cases eliminating the right to remove by sending unfiled draft complaints thirty days before filing them. The short answer is that no such abuse has occurred here; Michetti faxed a file-stamped copy of the complaint to a Murphy employee who knew enough to see that a response followed. Any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline, than Michetti's cunning.

The question of discouraging unjust tactics can thus be safely set "aside for consideration on a rainy day."[16] In any event, it appears unlikely that a plaintiff could eliminate the right to remove altogether by sending a draft complaint thirty days before filing it—until it is filed, a draft complaint is not the "initial pleading setting forth the claim for relief upon which such action . . . is based" that the defendant must receive to start the thirty-day clock.[17]

Conclusion

The district court's denial of the motion to remand is reversed and the action is remanded with instruction to the district court to remand the action to the Tenth Judicial Circuit of Alabama.

REVERSED and REMANDED WITH INSTRUCTION.

[16]Roe v. O'Donohue, 38 F.3d 298, 304 (7th Cir. 1994).

[17]28 U.S.C. § 1446(b).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

Michetti Pipe Stringing, Inc.,
a corporation,
Plaintiff,

v.

Murphy Brothers, Inc.,
a corporation,
Defendant.

[Entered: April 19, 1996]

ORDER

This cause came before the court at its regularly scheduled motion docket of this date on the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama. Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that the motion should be denied, the removal having been timely filed consistent with the meaning of 28 U.S.C.A. §1446(b). Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama be and it hereby is DENIED.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

Michetti Pipe Stringing, Inc.,
a corporation,
Plaintiff,

v.

Murphy Brothers, Inc.,
a corporation,
Defendant.

[Entered: April 19, 1996]

MEMORANDUM OPINION

The parties in the above-styled action agree on the facts. Suit was filed in the Tenth Judicial Circuit of Alabama on January 26, 1996. Defendant Murphy Brothers, Inc. [hereinafter Murphy] received a copy of the complaint on January 29, 1996, by facsimile. By letter of January 30, 1996, Murphy acknowledged receipt of the complaint, but Murphy did not file its notice of removal until March 13, 1996 (44 days after the period for filing the notice of removal began to run). The complaint was served on the defendant by certified mail on February 12, 1996.

At issue is whether the removal language of 28 U.S.C.A § 1446(b), which follows, is to be interrupted as beginning to run when receipt of the complaint was known (January 29, 1996) or when the summons and complaint were served (February 12, 1996):

> The notice of removal of a civil action or proceeding shall be filed within 30 days after **the receipt** by the defendant, through service **or otherwise**, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . (emphasis added).

Plaintiff has argued that the time for removal runs from knowledge of the proceedings, not the service of process. Were it not so Congress would not have inserted the words "after the receipt by the defendant, through service or otherwise." The Eleventh Circuit has not addressed the question of whether the language of the statute should be interrupted as the "Proper Service Rule" or the "Receipt Rule." The Sixth and Seventh Circuit Courts of Appeal have adopted the "Receipt Rule." *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("[T]he 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service.'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) ("The removal period is commenced when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim."). Both courts of appeal concluded that the "Proper Service Rule" cannot be reconciled with the wording of the statute.

In *The City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), Judge Hancock applied the "Service Rule," as did Judge Howard in *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377 (S.D. Ala. 1990). In denying the motion to remand Judge Hancock referred to *Marion* and *Love v. State Farm Mutual Automobile Insurance Company*, 542 F. Supp. 65 (N.D. Ga. 1982). Judge Hancock noted that a study of the congressional history surrounding 28 U.S.C. § 1446 indicates that the language relied on by the plaintiffs (28 U.S.C. § 1446(b)) was added to the statute in 1949 to correct a problem created by the 1948 revision of the statute.[1]

---

[1]In 1949 Congress did not anticipate use of facsmile transmissions.

In discussing the applicability of the statute in Alabama, Judge Hancock said the following:

> The 1949 addition supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served long with the summons (Ala. R. Civ. P. 4) (footnotes deleted).

This court agrees. Additionally, there could be problems in service upon a foreign state or political subdivision, agency, or instrumentality pursuant to 28 U.S.C. § 1608(a) which requires delivery of a copy of the summons and complaint in accordance with any special arrangements or an applicable international convention. In many instances service upon a foreign corporation takes much longer than 30 days. If the court were to adopt the "Receipt Rule," plaintiffs would be able to dodge the requirements of international treaties and trap foreign opponents into keeping their suits in state courts.

For the above-stated reasons the court holds that the motion to remand be denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

---

[Filed: Feb 23, 1998]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: COX AND BARKETT, Circuit Judges, and HUNT*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Cir-

---

*Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

cuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/E. R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

ORDER

[Filed: May 1, 1996]

This cause came before the court on the motion of plaintiffs for certification on appeal. The court ruled in favor of defendant by order entered April 19, 1996, holding that the time for removal begins running from the date of service of the summons and complaint. This court is of the opinion that this order may involve a controlling question of law to which there is substantial ground for difference of opinion and an immediate appeal from that order may advance the ultimate determination of this litigation. Accordingly, pursuant to 28 U.S.C.A. § 1292(b), it is

ORDERED that this cause be and it hereby is CERTIFIED for appeal to the United States Court of Appeals for the Eleventh Circuit to consider the following question:

> Should the wording of 28 U.S.C.A.(b) which requires "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant,

through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" be interpreted as the "Proper Service Rule" or the "Receipt Rule?"

No trial of this case on the merits shall be conducted pending such appeal.

DONE and ORDERED this 30th day of April 1996.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

CERTIFICATION RENEWAL ORDER

[Filed: Sept. 17, 1996]

This cause came before the court on the motion of plaintiffs for recertification on appeal.[1] The court ruled in favor of defendant by order entered April 19, 1996, holding that the time for removal begins running from the date of service of the summons and complaint. This court still holds the opinion that this order may involve a controlling question of law to which there is substantial ground for difference of opinion and an immediate appeal from that order may advance the ultimate determination of this litigation. Accordingly, pursuant to 29 U.S.C.A. § 1292(b), it is

[1] Pursuant to Charles A. Wright, *Federal Practice and Procedure*, § 3929 (1977) (recertification is available if the district court remains persuaded the appeal would prove useful); *Borskey v. American Pad & Textile Co.*, 296 F.2d 894, 895 (5th Cir. 1961 (Although the circuit court lacked power to act on a petition not filed within the required ten days, the district court had power to reexamine its decision and to certify its action on such reconsideration for interlocutory appeal).

ORDERED that this cause be and it hereby is RECERTIFIED for appeal to the United States Court of Appeals for the Eleventh Circuit to consider the following question:

> Should the wording of 28 U.S.C.A.(b) which requires "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" be interpreted as the "Proper Service Rule" or the "Receipt Rule?"

No trial of this case on the merits shall be conducted pending such appeal.

DONE and ORDERED this 17th day of September 1996.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-1192

MICHETTI PIPE STRINGING, INC.,
a corporation,
Petitioner,

versus

MURPHY BROTHERS, INC.,
a corporation,
Respondent.

[Filed: Dec. 5, 1996]

On Petition for Permission to Appeal an Interlocutory Order
Pursuant to 28 U.S.C. 1292(b)

BEFORE: ANDERSON, DUBINA and BARKETT, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. §1292(b) is GRANTED.

No. 97-1909

In The

Supreme Court of the United States

October Term, 1997

MURPHY BROS., INC.,

Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HOBART A. McWHORTER, JR.
Counsel of Record
J. DAVID PUGH
JAMES F. ARCHIBALD, III
BRADLEY ARANT ROSE
& WHITE LLP
Attorneys for Respondent
2001 Park Place
Suite 1400
Birmingham, AL 35203-2736
(205) 521-8000

148648

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does a defendant's receipt of a facsimile copy of a filed state court summons and complaint, prior to formal service of the summons and complaint, commence the defendant's time for removal under 28 U.S.C. § 1446(b), which provides that the time for removal begins thirty days after defendant's "receipt"of the complaint, through "service or otherwise"?

RULE 29.6 LISTING

Michetti Pipe Stringing, Inc. has no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Respondent Michetti Pipe Stringing, Inc. ("Michetti") respectfully requests that this Court deny Murphy Brothers, Inc.'s ("Murphy" or "Petitioner") petition for writ of certiorari, which seeks review of the United States Court of Appeals for the Eleventh Circuit's opinion in this case. The Eleventh Circuit's Opinion is reported at 125 F.3d 1396 (11th Cir. 1997) and set forth in the Petition as Appendix A.

STATEMENT OF THE CASE

Michetti adopts the Background section of the Eleventh Circuit's opinion and incorporates it herein by reference. *See* Pet. App. A-1 - A-2. Murphy's Statement of the Case omits a few pertinent facts surrounding its receipt of the Summons and Complaint. Michetti filed its Complaint in the Circuit Court of Jefferson County, Alabama, on January 26, 1996, and Murphy received by facsimile a file-stamped copy of Michetti's Complaint on January 29, 1996. Specifically, Michetti faxed the file-stamped Complaint to Rick J. Moskowitz, Vice President-Risk Manager for Murphy, the person who had been negotiating with Michetti representatives about the claims asserted in the Complaint.

The next day, by letter dated January 30, 1996, Moskowitz acknowledged receipt of the Complaint. His letter shows a clear understanding that prompt action needed to be taken by Murphy to protect its rights, *including Murphy's right to remove*. The concluding paragraph of the letter states as follows:

> However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here (in Illinois),

> we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defense and bar to the suit, whether in state court or *removed to Federal District Court*. (Emphasis added).

Murphy filed its notice of removal 43 days later — 44 days after its Risk Manager received a filed state court Complaint that he knew could be removed. Proper service of the Complaint by certified mail, which occurred 13 days after Moskowitz's letter, added nothing to Murphy's understanding of its rights and obligations.[1]

In accordance with the Eleventh Circuit's decision, the district court remanded this action to the Circuit Court of Jefferson County, Alabama, on or about March 10, 1998, wherein it is now pending. The action is set for trial on February 22, 1998.

REASONS FOR DENYING THE WRIT

I.

NO CIRCUIT SPLIT EXISTS, AS FOUR OUT OF FOUR CIRCUIT COURTS HAVE CONCLUDED THAT ACTUAL RECEIPT OF THE COMPLAINT, NOT FORMAL SERVICE OF THE COMPLAINT, TRIGGERS A DEFENDANT'S THIRTY DAYS TO REMOVE.

The timeliness of removal is governed by 28 U.S.C. § 1446(b), which provides in pertinent part:

1. Note 2 of the Petition complains that the "Receipt Rule" embraced by the Eleventh Circuit may be a "trap" for the unwary. The Eleventh Circuit properly concluded that no abuse occurred in this case based on the facts before it, and the question of "discouraging unjust tactics" could await a case with more appropriate facts. Pet. App. A-6.

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the *receipt* by the defendant, through service *or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .

28 U.S.C. § 1446(b) (emphasis added). In addition to the Eleventh Circuit in this case, three other Circuit Courts of Appeal have interpreted this statute and found it unambiguous: a defendant must remove within 30 days following *receipt* of the complaint, regardless of whether that receipt was through formal service *or otherwise*. *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841-42 (5th Cir. 1996) ("according to the statute, the thirty-day period begins when the defendant receives a copy of the initial pleading through *any* means, not just service of process."); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("the 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service' "); *Tech Hills II Assoc. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (the 30 days commences "when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim"). No other Circuit Courts of Appeal have addressed this issue. No Circuit has embraced the position advanced by Murphy.

To somehow create the impression of a cert-worthy split in authority, Petitioner cites district court opinions that embrace the so-called "Proper Service Rule" instead of the "Receipt Rule" embraced by the Fifth, Sixth, Seventh, and, in this case, Eleventh Circuit Court of Appeal. This Court need not grant certiorari to resolve splits among just a few district courts. That task is better left to the respective Circuit Courts of Appeals, as illustrated perfectly by the fact that *several* of the district

court splits identified in note 3 of the Petition already have been ironed out by Circuit-level decisions.

For example, Petitioner cites three "Proper Service Rule" cases from district courts in the Eleventh Circuit that predated and, therefore, were reversed by the Eleventh Circuit's decision in this case: *Kelly v. Dolgen Corp., Inc.*, 972 F. Supp. 1470 (M.D. Ga. 1997); *The City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995); *Love v. State Farm Mutual Automobile Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982).[2] Petitioner also cites *Valentine Sugars, Inc. v. Phillips Petroleum Co.*, 1989 U.S. Dist. LEXIS 16028 (E.D. La. 1990), a "Proper Service Rule" case from Louisiana, that was reversed by the Fifth Circuit's later decision in *Reece*. As this issue continues to percolate through the lower courts, more "Proper Service Rule" district court decisions may be eliminated by the various Circuit Courts of Appeal. Until other Circuits expressly disagree with the Fifth, Sixth, Seventh, and Eleventh Circuit, intervention by this Court is not justified on the basis of an alleged "split of authority."

The Petition contains two lengthy footnotes listing "split" decisions from the district courts: notes 3 and 13. Cumulatively, the two footnotes cite twenty-two different district court cases, with eleven embracing the "Proper Service Rule" and eleven embracing the "Receipt Rule." As explained in the preceding paragraph, however, at least four of the eleven "Proper Service Rule" cases have been reversed by Circuit Court decisions. Therefore, Petitioner offers only seven district court decisions from six different states that embrace the "Proper Service Rule"

2. In *Beal Bank, S.S.B. v. CJP, L.L.C.*, 982 F. Supp. 1469, 1471 (N.D. Ga. 1997), the Court recognized *Michetti's* impact on *Love*: "[t]hus, although this decision does not specifically mention *Love*, *Michetti* directly overrules the adoption of the 'proper service rule' by this or any other federal district court within the Eleventh Circuit."

against four Circuit Court decisions (not to mention numerous district court decisions) embracing the "Receipt Rule." Petitioner's attempt to portray a split in authority worthy of this Court's attention fails dramatically.[3]

II.

THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT § 1446(b) REQUIRES REMOVAL WITHIN 30 DAYS OF A DEFENDANT'S RECEIPT OF THE FILED SUMMONS AND COMPLAINT BY FACSIMILE.

A. The plain meaning of § 1446(b) says actual receipt, not formal service, starts a defendant's time for removal.

The Eleventh Circuit's interpretation of the statute is correct unless the word "receipt" and the phrase "or otherwise" are read out of § 1446(b). If Congress intended formal service of process to be the only trigger for the 30-day removal period, then § 1446(b) would say "the notice of removal must be filed within 30 days following service of the initial pleading setting forth the claim for relief." It does not. Instead, § 1446(b) clearly and unambiguously states that receipt of the complaint by means other than service triggers the 30 day removal period.

Indeed, the grammatical construction of the statute confirms that Congress' primary concern was with *receipt* of the complaint, rather than with perfection of service, for commencing the 30-day removal period. In *Lindley v. DePriest,*

3. Petitioner argues that the obstacles to appellate review of removal orders by district courts overcome the lack of an appellate court split. Four Circuits have addressed the issue, however, and all four reached the same conclusion. Perhaps if only two appellate courts had addressed the issue, and they had split, petitioner's argument might carry some weight.

755 F. Supp. 1020, 1024 (S.D. Fla. 1991), the court observed: "Congress emphasized 'receipt' and subordinated 'service of process' when it chose to set off 'through service or otherwise' as a dependent clause." The *Lindley* court concluded that *receipt* of the complaint, not formal service, triggered the removal period. *Id.* at 1026. This Court must look no further than the express wording of § 1446(b) to conclude that the decisions by the Fifth, Sixth, Seventh, and Eleventh Circuit are absolutely correct and need not be disturbed.

B. Even if the Court reviews the legislative history behind § 1446(b), that history supports the Eleventh Circuit's decision because Congress was trying to make the removal laws uniform.

Because the language of § 1446 is clear and unambiguous in requiring a defendant to remove within 30 days following "receipt" of the complaint "through service or otherwise," there is no reason to even consider legislative history. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Petitioner must rely on legislative history, however because, on its face, the statute does not support the "Proper Service Rule" at all. Nevertheless, even if legislative history were important, Petitioner and district courts that adopted the "Proper Service Rule" misinterpret the legislative history of § 1446(b). Indeed, the legislative history provides further support for the interpretation advanced by Michetti herein that has been embraced by the Fifth, Sixth, Seventh and Eleventh Circuit Courts of Appeal.

Based on the "legislative history," Petitioner claims that "or otherwise" was added to § 1446(b) by a 1949 Amendment solely to provide for removal in states which allow a civil action to be commenced by service of a summons without a complaint,

such as New York (hereinafter, "the New York problem"). According to Petitioner, "or otherwise" does not apply in states like Alabama which require a complaint to commence a civil action. The broad language employed by Congress defeats this interpretation. *See* Pet. App. A-5. While solving the "New York problem" was one of the purposes behind the 1949 Amendment to § 1446(b), the primary purpose was establishing a uniform time for removal in every state.

Before the 1949 Amendment, Congress amended § 1446(b) in 1948 so that the time for removal no longer varied from state-to-state depending on when a responsive pleading was due under the particular state's rules of procedure. *See* Pet. App. A-4; *Reece*, 98 F.3d at 841. When Congress further amended § 1446(b) in 1949 to add the "receipt" and "or otherwise" language, Congress merely intended to establish further the uniform trigger for the removal period it created in the 1948 Amendment:

> The purpose [of the 1949 Amendment] . . . was to establish a uniform federal system for removal of cases to federal court. In order to accommodate state systems that permit suit to be commenced simply by serving the defendant with a summons but not a copy of the complaint, § 1446(b) was drafted to require receipt of the complaint to start the thirty day clock running. The reason is straightforward: Until the defendant receives the complaint he has no way of knowing whether he has grounds to remove the action to federal court . . . [or whether] he wants to remove the action to federal court; and he cannot satisfy the requirement of setting forth a "short and plain statement of the grounds for removal" as is demanded by 28 U.S.C. § 1446(a). *Once the defendant receives the complaint, all these*

> *problems are cured. Proper service in accordance with state procedural rules, however, adds nothing. So long as the defendant has the complaint in hand, he has sufficient information to determine whether he can and should remove.*

Kluksdahl v. Muro Pharmaceutical, Inc., 886 F. Supp. 535, 539 (E.D. Va. 1995) (*citing Schwartz Bros., Inc. v. Striped Horse Records*, 745 F. Supp. 338, 340 (D. Md. 1990)) (emphasis added).

Nothing in the language of the 1949 Amendment or in the legislative history suggests that Congress intended to discard the more uniform rule created by the amendment adopted only one year earlier. Rather, as the Seventh Circuit reasoned,

> by emphasizing the link between possessing a copy of the pleadings and the time for removal, the 1949 deliberations strongly suggest that we should take "or otherwise" seriously: knowledge of the nature of the claims, and not the state's technical rules of service, determines timeliness.

Roe, 38 F.3d at 303 (emphasis added). As the Eleventh Circuit recognized below, the Senate report that accompanied the 1949 Amendment stated, " '[i]t is believed that this will meet the varying conditions of practice in all the States.' " *See* Pet. App. A-5. This report, and the broad language utilized by Congress, defeat Murphy's claim that "or otherwise" applies only in New York and like states.

Indeed, by tying the commencement of the removal period to individual state rules governing service of process, the "Proper Service Rule" thwarts the uniformity that Congress hoped to achieve in the 1948 and 1949 Amendments to

§ 1446(b). Congress intended to establish a uniform rule that any receipt of the complaint triggered the removal period, regardless of whether the complaint had been "served" in accordance with a given state's rules. In the final analysis, the Proper Service Rule is at odds not only with the plain wording of § 1446(b) but also with the legislative intent.[4]

---

4. Petitioner also seeks to introduce arguments that it did not make in the Eleventh Circuit. For example, Petitioner claims that the receipt rule "conflicts with other removal statutes" (Pet. at 11-12). Petitioner never made this argument in the trial court or the Eleventh Circuit and, therefore, it is not addressed in the opinions below. Petitioner's still-evolving analysis only highlights the need for additional percolation of this issue in the lower courts.

CONCLUSION

All the Circuit Courts of Appeal to address the issue — the Fifth, Sixth, Seventh and Eleventh Circuit — have held that actual receipt of the complaint by the defendant, regardless of the manner of receipt (that is, whether by formal service or otherwise), commences the defendant's thirty days to remove. This unanimity among the circuits is not merely fortuitous; rather, it reflects the clarity of Congress' expression of its intent in § 1446(b) that the time for removal be linked uniformly to actual receipt of the complaint. The issue is not unsettled. There is no split of authority. Certiorari should not be granted.

Respectfully submitted,

HOBART A. McWHORTER, JR.
Counsel of Record
J. DAVID PUGH
JAMES F. ARCHIBALD, III
BRADLEY ARANT ROSE
& WHITE LLP
Attorneys for Respondent
2001 Park Place
Suite 1400
Birmingham, AL 35203-2736
(205) 521-8000

(3)

No. 97-1909

In the Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.
Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

DEBORAH ALLEY SMITH*
RHONDA PITTS CHAMBERS
RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner
Murphy Bros., Inc.

HOBART A. MCWHORTER, JR.*
J. DAVID PUGH
JAMES F. ARCHIBALD, III
BRADLEY ARANT ROSE &
WHITE LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent
Michetti Pipe Stringing, Inc.

*Counsel of Record

PETITION FOR CERTIORARI FILED MAY 26, 1998
CERTIORARI GRANTED NOVEMBER 2, 1998

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

32 pp

TABLE OF CONTENTS

APPENDIX A

RELEVANT DOCKET SHEET ENTRIES

Jefferson County Circuit Court, Tenth Judicial Circuit of Alabama

01/26/96	Michetti Pipe Stringing Inc. ("Michetti") files suit against Murphy Brothers, Inc. ("Murphy Bros.").
02/12/96	Summons & complaint served upon Murphy Bros.
03/13/96	Murphy Bros. files notice of removal to U.S. District Court.

U.S. District Court for the Northern District of Alabama, Southern Division

03/15/96	Notice of removal docketed.
04/03/96	Michetti files motion to remand case to Circuit Court of Jefferson County.
04/19/96	District Court denies motion to remand.

United States Court of Appeals for the 11th Circuit

12/05/96	Petition for permission to appeal is granted.
10/24/97	Court of Appeals reverses and remands case with instruction.
02/23/98	Court denies Michetti's petition for rehearing and suggestion for rehearing en banc.

APPENDIX B

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED: January 26, 1996

Civil Action No. CV9600638

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

vs.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

COMPLAINT

For its Complaint against Murphy Brothers. Inc. (hereinafter "Murphy"), Michetti Pipe Stringing, Inc. (hereinafter "Michetti") states as follows:

1. Michetti is a corporation organized under the laws of Alberta, Canada, and has its principal place of business in Nisku, Alberta, Canada.

2. Murphy is an Illinois corporation having its principal place of business in East Moline, Illinois.

3. Murphy has been qualified to do business in Alabama since at least 1985 and, on information and belief, Murphy regularly performs work within the State of Alabama. Murphy's registered agent for service of process in Alabama is United States Corporation Company, 57 Adams Avenue, Montgomery, Alabama 36104-4045.

4. Murphy is an Alabama licensed general contractor. license no. 15519.

COUNT I
Breach of Contract

5. Michetti repeats and realleges paragraphs 1 through 4 as if fully set forth herein.

6. On information and belief, Murphy contracted with Florida Gas Transmission Company to construct a natural gas pipeline in Alabama and Florida (the "Project").

7. On or about June 24.1994, Michetti entered into a subcontract with Murphy to perform the pipe stringing portion of Murphy's contract with the owner, Florida Gas Transmission Company (the "Contract").

8. During the late Summer of 1994, in approximately August and September, the Project experienced significant delays and differing site conditions due to excessive rain and flooding among other things.

9. Michetti made a claim to Murphy to increase its unit price for pipe stringing due to the increased costs it incurred.

10. Murphy and Michetti agreed to settle Michetti's claim in return for a payment from Murphy of approximately $440.000.

11. Murphy agreed to pay Michetti by increasing the unit rate at which Michetti was to be compensated for pipe stringing on the remaining work.

12. After settling with Michetti by agreeing to pay an increased rate on the remaining work, Murphy began to self-perform work that was within the scope of Michetti's Contract, in effect denying Michetti the opportunity to receive the payment which it had already been promised by Murphy for its claim. Murphy's conduct interfered with and prevented Michetti's performance of the Contract and constitutes a breach.

13. Despite repeated demands, Murphy has persistently failed and refused to pay Michetti the amounts it is owed under the Contract.

WHEREFORE, PREMISES CONSIDERED, Michetti Pipe Stringing, Inc. demands judgment in its favor in the amount of approximately, to wit, $440,000, together with interest, costs and attorneys' fees and such further legal or equitable relief as this Court deems just and proper.

COUNT II
Fraud

14. Michetti repeats and realleges paragraphs 1 through 13 as if fully set forth herein.

15. Murphy contends that it is relieved of any obligation to pay Michetti by virtue of a purported release, dated July 4, 1995. Even if said release is enforceable, which it is not, the express language of the purported release does not extend to the claims asserted herein by Michetti.

16. Even if the purported release does extend to Michetti's claims herein, which it does not. Michetti was fraudulently induced by Murphy to sign to [sic] purported release through intentional or negligent misrepresentations by Murphy and the suppression of material facts by Murphy; therefore, said release is not enforceable.

17. The purported release was obtained from Michetti only because of Murphy's fraudulent misrepresentation that the release had to be given by Murphy to Florida Gas Transmission Company so that Murphy could obtain from Florida Gas Transmission Company the money with which Murphy would pay all amounts then owing Michetti including the agreed-upon $440,000 settlement of Michetti's claim.

18. Murphy's representations to Michetti prior to executing the release were false, and Murphy knew those representations were false when made, or innocently made the representations with the intent they be relied upon by Michetti.

19. Michetti reasonably relied upon Murphy's representations in executing the purported release and has been damaged thereby. Murphy's representations to Michetti are violative of Ala. Code § § 6-5-100, *et seq.*

WHEREFORE, PREMISES CONSIDERED, Michetti Pipe Stringing, Inc. demands judgment in its favor in the amount of approximately, to wit, $440,000, and such punitive damages as may be awarded by the trier of fact, together with interest, costs and attorneys' fees and such further legal or equitable relief as this Court may deem just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY.

/s/J. David Pugh
J. David Pugh

/s/James F. Archibald, III
James F. Archibald, III

Attorneys for Michetti Pipe Stringing, Inc.

OF COUNSEL:
BRADLEY, ARANT, ROSE & WHITE
2001 Park Place, Ste. 1400
Birmingham, Alabama 35203
(205) 521-8000

PLEASE SERVE DEFENDANT AS FOLLOWS:

BY CERTIFIED MAIL:

Murphy Bros., Inc.
c/o United States Corporation Company
57 Adams Avenue
Montgomery, Alabama 36104-4045

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

FILED: March 13, 1996

Case No. CV-96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

vs.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

NOTICE OF REMOVAL

COMES NOW, defendant Murphy Bros., Inc. (incorrectly identified in the Complaint as Murphy Brothers, Inc.) and hereby files this notice of removal of the above-described action to the United States District Court for the Northern District of Alabama, from the Circuit Court of Jefferson County, Alabama where the action is now pending. As grounds for this removal, defendant sets forth the following:

1. The above-entitled action was commenced by the Plaintiff in the Circuit Court of Jefferson County, Alabama and is now pending in that court, bearing Civil Action Number CV9600638.

2. Process was served on and initially received by defendant on February 14, 1996.

3. This is a civil action for damages allegedly arising out of breach of contract and fraud.

4. Plaintiff is now and was at the time the said action was commenced a Canadian company with its principal place of

business in Nisku, Alberta, Canada. Defendant is now and was at the time the said action was commenced an Illinois corporation with its principal place of business in East Moline, Illinois.

5. No change of citizenship of parties has occurred since the commencement of the action. Defendant is not a citizen of the state in which the action was brought.

6. The matter in controversy exceeds, exclusive of costs and disbursements, the sum of value of Fifty Thousand Dollars ($50,000) because the plaintiff is seeking damages in excess of $440,000.00.

7. Copies of all process, pleadings and orders served upon defendant are filed with this notice.

8. Defendant will give written notice of the filing of this notice of removal as required by 28 U.S.C. §1446(d).

9. A copy of this notice will be filed with the Clerk of the Circuit Court of Jefferson County, Alabama as required by 28 U.S.C. §1446(d).

WHEREFORE, Defendant requests that this action proceed in this Court as an action properly removed to it.

/s/Susan S. Hayes
Thomas A. Carraway
Bar ID No. 417-64-0321

Susan S. Hayes
Bar ID No. 420-84-5527

Attorneys for Murphy Brothers, Inc.

OF COUNSEL:
RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North Twentieth Street
Birmingham, AL 35203
(205) 328-8141

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing pleading upon all counsel of record in this cause by placing a copy of same in the United States mail, postage prepaid, addressed as follows on this the 13th day of March, 1996:

J. David Pugh, Esq.
James F. Archibald, III
BRADLEY ARANT ROSE & WHITE
2001 Park Place, Suite 1400
Birmingham, Alabama 35203

/s/Susan S. Hayes
OF COUNSEL

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CV-96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

vs.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

MOTION TO REMAND

Plaintiff Michetti Pipe Stringing, Inc. ("Michetti") hereby moves this Court to remand this action to the Circuit Court of Jefferson County, Alabama wherein the action was originally filed. As grounds for remand, Michetti shows unto the Court that the Notice of Removal was not timely filed:

1. Michetti filed its complaint in the Circuit Court of Jefferson County on January 26, 1996.

2. Defendant Murphy Brothers, Inc. ("Murphy") received a copy of Michetti's complaint on January 29, 1996. On that date, counsel for Michetti conveyed a copy of the complaint via facsimile to Rick J. Moskowitz, Vice President-Risk Manager for Murphy. Representatives of Michetti, including Michetti's counsel, had communicated with Moskowitz on several occasions shortly before the filing of Michetti's complaint regarding the issues in dispute between the parties. A true and correct copy of the facsimile transmission of the complaint to Murphy is attached hereto a Exhibit A.

3. By letter dated January 30, 1996, Murphy acknowledged receipt of the complaint. A true and correct copy of this letter is attached hereto as Exhibit B. In this letter, Murphy states "the Fax transmission of your cover letter with Summons and Complaint in regard to the above matter was brought to my attention this morning." Murphy's letter, signed by Rick Moskowitz, shows a clear understanding that prompt action needed to be taken by Murphy to protect its rights, *including Murphy's right to remove*. The concluding paragraph of the letter states as follows:

> However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here (in Illinois), we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defense and bar to the suit, whether in state court or *removed to Federal District Court.* (emphasis added).

4. The time period within which a state court defendant may remove a case to federal court is limited to 30 days from *receipt* of the complaint under 28 U.S.C. §1446(b), which provides in pertinent part:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ....

5. Murphy did not file its notice of removal within 30 days after its receipt of the initial pleading setting forth Michetti's claim for relief. The 30-day period for filing the notice of removal began on January 29, 1996, when Murphy received a facsimile copy of the complaint which had been filed in state court by Michetti. Murphy did not file its notice of removal until March 13, 1996, 44 days after the period for filing the notice of removal began to run. Therefore, the notice of removal is untimely, and this action must be remanded to the Circuit Court of Jefferson County, Alabama.

6. In *Pillin's Place. Inc. v. Bank One. Akron. N.A.*, 771 F. Supp. 205, 206 (N.D. Ohio 1991), the court held that the 30-day period for filing the notice of removal began to run when the manager of the defendant's collections department received a facsimile copy of the complaint which had been filed in state court. The court held that, even though the defendant filed its removal notice within 30 days of service of the summons and complaint, the action was due to be remanded because the removal was filed more than 30 days after the defendant received the facsimile copy of the complaint. *Id. Pillin's Place* is factually indistinguishable from the case at bar. For the Court's convenience, a copy of this decision is attached hereto as Exhibit C.

7. Some courts have held that the 30-day removal period does not begin running until the summons and complaint have been served. *See, e.g., Love v. State Farm Mutual Automobile Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982); *Marion Corp. v. Lloyds* Bank. PLC, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990). Such cases, espousing the so-called "Proper Service Rule" "ignore the clear and unambiguous language of the statute." *Pillin's Place*, 771 F. Supp. at 207. The applicable statute, 28 U.S.C. § 1446(b), clearly and unambiguously states that the notice shall be filed within 30 days "*after the receipt by the defendant, through service or otherwise*" of a copy of the complaint. If proper service were the only trigger for the 30-day removal period, then Congress would not have inserted the "or otherwise" language into § 1446(b). "Interpretation of a statute must begin with the statute's language." *Mallard v. United States District Court for the Southern District of Iowa,* 490 U.S. 296, 300 (1989) (citations omitted). "The plain meaning of legislation should be

conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstratively at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises. Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors. Inc.*, 458 U.S. 564, 571 (1982)).

8. Even if § 1446(b)'s directive that the 30-day removal period begins upon *receipt* of the complaint were somehow found to be ambiguous, any ambiguity must be resolved in favor of remand. As the United States Supreme Court explained in *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941):

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation .... "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

Therefore, even if 28 U.S.C. § 1446(b) were found ambiguous, that ambiguity must be resolved against removing the defendant Murphy.

9. The majority of federal courts addressing this issue have rejected the Proper Service Rule in favor of the "Receipt Rule." *See Klukesdahl v. Muro Pharmaceuticals Inc.*, 886 F. Supp. 535, 537 (E.D. Va. 1995). Under the Receipt Rule, the 30 day removal period begins running when the defendant, or its authorized agent, comes into possession of a copy of the complaint regardless of whether the delivery of the complaint complies with the requirements for formal service of process. *Id.*; *see also Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc.*, 880 F. Supp. 499, 500 (S.D. Tex. 1995) (holding that receipt of courtesy

copy of complaint triggered the 30-day removal period); *Alliance Financial Services v. Villa Del Rey-Roswell. Ltd.*, 879 F. Supp. 1140, 1141 (D. Utah 1995) (holding that actual notice through receipt of complaint, not formal perfection of service, triggers 30-day removal period); *Rothwell v. Durbin,* 872 F. Supp. 880, 881 (D. Kan. 1994) (holding that removal was untimely because three months had elapsed since defendant received a courtesy copy of the complaint, even though the notice of removal was filed within 30 days from formal service); *Shoemaker v. GAF Corp.*, 814 F. Supp. 495, 498 (W.D. Va. 1993) (holding that pre-service receipt of complaint triggers 30-day removal period); *City of New Orleans v. Illinois Central Rail Co.*, 804 F. Supp. 873, 875-76 (E.D. La. 1992) (holding that removal more than 30 days after receipt of courtesy copy of complaint by the vice president and general counsel of the defendant was untimely, even though the notice of removal was filed within 30 days from formal service); *Greensmith Co. v Com Systems. Inc.*, 796 F. Supp. 812, 814 (D. N.J. 1992) (holding that receipt of copy of complaint by CEO triggers 30-day removal period, not formal service of process); *Lindley v. DePriest,* 755 F. Supp. 1020, 1026 (S.D. Fla. 1991) (holding that "any receipt" of complaint by defendant triggers 30-day removal period, regardless of actual date of formal service); *Silverwood Estates Development Limited Partnership v. Adcock,* 793 F. Supp. 226, 228 (N.D. Cal. 1991) (holding that defendant's receipt of draft complaint giving notice that action was removable triggered 30-day removal period); *Uhles v. F.W. Woolworth Co.*, 715 F. Supp. 297, 298 (C.D. Cal. 1989) (holding that receipt of the complaint by the defendant's attorney triggered the 30-day removal period, even though service of process was not perfected until later, and action was removed within 30 days of formal service); *Harding v. Allied Products Corp.*, 703 F. Supp. 51, 52 (W.D. Tenn. 1989) (holding that receipt of complaint by corporate counsel triggers 30-day removal period, even though such receipt did not constitute proper service of process).

10. The Eleventh Circuit has not addressed the Proper Service Rule or the Receipt Rule. In fact, only two appellate courts, the Seventh and Six [sic] Circuit Courts of Appeals, have addressed the conflicting rules. Both courts adopted the Receipt Rule. *See Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("the 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (the 30 days commences "when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim"). Both courts of appeals concluded that the Proper Service Rule cannot be reconciled with the plain wording of the statute. In *Roe*, for example, the Seventh Circuit stated "like the judges who decided *Tech Hills*, we see no escape from the language of the statute." 38 F.3d at 303.

11. Based on the plain wording of § 1446(b) and the foregoing authority, Murphy's notice of removal—filed 44 days after Murphy's receipt of a facsimile copy of the complaint—was not timely filed. Therefore, this action is due to be remanded to the Circuit Court for Jefferson County.

WHEREFORE, premises considered, Michetti Pipe Stringing, Inc. respectfully asks the Court to enter an order remanding this action to the Circuit Court for Jefferson County, Alabama, and providing such further and additional relief that the Court deems just and proper.

Respectfully submitted,
/s/J. David Pugh
J. David Pugh

/s/James F. Archibald, III
James F. Archibald, III
Attorneys for Michetti Pipe Stringing, Inc.

OF COUNSEL:
BRADLEY, ARANT, ROSE & WHITE
P.O. Box 830709
Birmingham, Alabama 35283-0709
(205) 521-8000

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on Thomas A. Carraway, Esquire and Susan S. Hayes, Esquire, Rives & Peterson, 1700 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203 by delivering a copy of same to them on this 3rd day of April, 1996.

/s/James F. Archibald
OF COUNSEL

Send Confirmation Report

Name: BRADLEY,ARANT,ROSE ID: 252064 01/29/96 17:50 Page 1

Job	Start time	Usage	Phone Number or ID	Type	Pages	Mode	Status
728	1/29 17:44	5'48"	555156113097521259	Send	9/ 9	144	Completed
	Total	5'48"			9/ 9		

BRADLEY, ARANT, ROSE & WHITE
POST OFFICE BOX 830709
BIRMINGHAM, ALABAMA 35283-0709
Telephone (205)521-8000
Fax (205)521-8715

CONFIRMATION COPY

DATE: January 29, 1996 TIME:

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Rick J. Moskowitz FAX NO. (309) 752-1259

CITY: East Moline, IL PHONE NO. (309) 752-1227

THIS TRANSMITTAL BEING SENT BY:

NAME: J. Daryl Pugh, Esq. JDW DIRECT DIAL (205) 521-8314

MESSAGE:

NUMBER OF PAGES 9 INCLUDING COVER SHEET

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE. MY NUMBER IS (205) 521-8568

NAME: DB #156
Operator

(Note: The following portions of Exhibit A to Motion to Remand have been omitted in printing: Civil Cover Sheet, Summons, and Complaint. The Complaint appears in the joint appendix at page A-2.)

EXHIBIT
A

January 29, 1996

Mr. Rick J. Moskowitz
MURPHY BROS., INC.
3150 5th Avenue
East Moline, Illinois 61244

Re: Michetti Pipe Stringing Florida Gas Project

Dear Rick:

When we did not hear back from you last week after our conversation on Wednesday with any further developments in the dispute between Murphy Brothers and Michetti Pipe Stringing, we had no alternative but to file a complaint to preserve all of our rights. A copy of the complaint is enclosed.

Please understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies. However, Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation. Accordingly, we are providing a courtesy of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter.

Very truly yours,
/s/J. David Pugh
J. David Pugh

JDP/rle
Enclosure

cc: Mr. Benny Michetti (w/enc.)
Mr. James Stone (w/enc.)

Murphy Bros., Inc.

DATE: 1/ 30 /96 A.M./P.M.

FACSIMILE TO: David Pugh, Esq.

Bradley, Arant Law Offices

FAX NO: 205 - 521 - 8715

FROM: Rick Moskowitz

RE: Michetti

NUMBER OF PAGES TWO [2] INCLUDING COVER SHEET

MESSAGE:

Please find herewith one (1) page letter of this date.

Thank you.

Dave -
Please give me a call after you receive + review the ltr. Thanks!
Rick

EXHIBIT
1 B

Tel: (309) 752-1227
3150 - 5th Avenue
East Moline, Illinois 61244
FAX: (309) 752-1259

Murphy Bros., Inc.

Via Facsimile ONLY

January 30, 1996

Mr. J. David Pugh, Esq.
Bradley, Arant Law Offices
2001 Park Place
Birmingham, AL 35203

RE: Michetti Pipe Stringing, Inc.

Dear David:

The Fax transmission of your cover letter with Summons and Complaint in regard to the above matter was brought to my attention this morning.

Replying specifically to your letter, my notes of last Wednesday reflect that I would contact you after speaking with Mike Murphy, and similarly, that you would contact me after reporting to Bennie Michetti. Meanwhile, we were anticipating that someone from your client's organization would surely have contacted Lucien for his input, and so advise us.

I did speak with Mike late Friday and I was very busy yesterday, though I note the suit was file-stamped on Friday. I do not believe the information that I was to provide to you would have averted your present action in any event, particularly since the suit was filed so soon and your clients raised nothing 'new' which would have suggested the need for further direct involvement of Bill or Mike.

However, I am sure when I report to Bill and Mike on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here, we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defenses and bar to the suit, whether in state court or removed to Federal District court. And, in Illinois, the remedy of sanctions is available to us for pleadings which are filed and found not to be in good faith when signed by either or both counsel and party litigant.

Very truly yours,

Rick J. Moskowitz
Vice President - Risk Manager

RJM:nd

Tel: (309) 752-1227 3150 - 5th Avenue East Moline, Illinois 61244 FAX: (309) 752-1259

(Note: Exhibit C to Motion to Remand, which is a copy of *Pillin's Place, Inc., v. Bank One, Akron, N.A.*, 771 F. Supp. 205 (N.D. Ohio 1991), has been omitted in printing.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

[ENTERED: April 19,1996]

ORDER

This cause came before the court at its regularly scheduled motion docket of this date on the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama. Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that the motion should be denied, the removal having been timely filed consistent with the meaning of 28 U.S.C.A. §1446(b). Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama be and it hereby is DENIED.

DONE and ORDERED this l9th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

[ENTERED: April 19, 1996]

MEMORANDUM OPINION

The parties in the above-styled action agree on the facts. Suit was filed in the Tenth Judicial Circuit of Alabama on January 26, 1996. Defendant Murphy Brothers, Inc. [hereinafter Murphy] received a copy of the complaint on January 29, 1996, by facsimile. By letter of January 30,1996, Murphy acknowledged receipt of the complaint, but Murphy did not file its notice of removal until March 13,1996 (44 days after the period for filing the notice of removal began to run). The complaint was served on the defendant by certified mail on February 12, 1996.

At issue is whether the removal language of 28 U.S.C.A §1446(b), which follows, is to be interrupted [sic] as beginning to run when receipt of the complaint was known (January 29,1996) or when the summons and complaint were served (February 12, 1996):

> The notice of removal of a civil action or proceeding shall be filed within 30 days after **the receipt** by the defendant, through service **or otherwise**, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . (emphasis added).

Plaintiff has argued that the time for removal runs from knowledge of the proceedings, not the service of process. Were it not so Congress would not have inserted the words "after the receipt by the defendant, through service or otherwise." The Eleventh Circuit has not addressed the question of whether the language of the statute should be interrupted [sic] as the "Proper Service Rule" or the "Receipt Rule." The Sixth and Seventh Circuit Courts of Appeal have adopted the "Receipt Rule." *Roe v. O'Donohue,* 38 F.3d 298,304 (7th Cir. 1994) ("[T]he 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service.'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.,* 5 F.3d 963, 968 (6th Cir. 1993) ('The removal period is commenced when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim."). Both courts of appeal concluded that the "Proper Service Rule" cannot be reconciled with the wording of the statute.

In *The City National Bank of Sylacauga v. Group Data Services,* 908 F. Supp. 896 (N.D. Ala. 1995), Judge Hancock applied the "Service Rule," as did Judge Howard in *Marion Corp. v. Lloyds Bank, PLC,* 738 F. Supp. 1377 (S.D. Ala. 1990). In denying the motion to remand Judge Hancock referred to *Marion* and *Love v. State Farm Mutual Automobile Insurance Company,* 542 F. Supp. 65 (N.D. Ga. 1982). Judge Hancock noted that a study of the congressional history surrounding 28 U.S.C. § 1446 indicates that the language relied on by the plaintiffs (28 U.S.C. §1446(b)) was added to the statute in 1949 to correct a problem created by the 1948 revision of the statute.[1]

---

[1] In 1949 Congress did not anticipate use of facsmile transmissions.

In discussing the applicability of the statute in Alabama, Judge Hancock said the following:

> The 1949 addition supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served long with the summons (Ala. R. Civ. P. 4) (footnotes deleted).

This court agrees. Additionally, there could be problems in service upon a foreign state or political subdivision, agency, or instrumentality pursuant to 28 U.S.C. § 1608(a) which requires delivery of a copy of the summons and complaint in accordance with any special arrangements or an applicable international convention. In many instances service upon a foreign corporation takes much longer than 30 days. If the court were to adopt the "Receipt Rule," plaintiffs would be able to dodge the requirements of international treaties and trap foreign opponents into keeping their suits in state courts.

For the above-stated reasons the court holds that the motion to remand be denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC.
a corporation
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC.,
a corporation
Defendant-Appellee

Oct. 24, 1997

Appeal from the United States District Court
for the Northern District of Alabama
(No. 96-CV-673-JFG), J. Foy Guin, Jr., Judge

Before COX and BARKETT, Circuit Judges, and HUNT[*], District Judge.
COX, Circuit Judge:

This interlocutory appeal presents a single issue: whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins when the defendant receives a copy of the plaintiff's initial pleading, or when the defendant is served with a copy of that pleading. Concluding that the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading, we reverse.

Background

Michetti Pipe Stringing, Inc. sued Murphy Bros., Inc. in Alabama state court. Within a few days of filing suit, Michetti's

---

* Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

counsel faxed a file-stamped copy of the complaint with a cover letter to Murphy's vice president for risk management. Murphy replied to the letter and acknowledged receipt of the complaint. Two weeks later, Michetti formally served Murphy by certified mail.

Murphy filed a notice of removal under 28 U.S.C. §1446(a) thirty days after the complaint had been served—but forty-four days after receiving the facsimile copy. Michetti moved the district court to remand the case to state court on the ground that the notice of removal was untimely. Citing district court precedent from Alabama and elsewhere in this circuit, the court denied the motion, but certified the order for interlocutory appeal, identifying the key question to be whether 28 U.S.C. §1446(b) embodies a "receipt rule" or a "service of process rule."

This court granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b). Michetti now invites us to follow the statute's plain language and hold that § 1446(b)'s thirty-day period runs from the defendant's receipt of the complaint. Murphy, on the other hand, points to both legislative history and fairness concerns in asking for a rule that the thirty-day clock starts to tick upon service. Murphy proposes that service for this purpose need not mean service that complies with state procedures, as long as the plaintiff intended it as service.[1] Because the question here is purely one of law, we review de novo the district court's denial of the motion to remand.[2]

Discussion

Section 1446, which governs the procedure for removal of a case from state to federal court, limits the period in which a defendant may exercise his removal right:

[1] (Appellee's Br. at 6.)

[2] See Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 865 (11th Cir. 1997).

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ....[3]

By and large, our analysis begins and ends with the three italicized words. The statute uses the word "receipt," not "service," to describe the action that starts the thirty-day clock. "Receipt" is the nominal form of "receive," which means broadly "to come into possession of" or to "acquire."[4] Attached to "receipt," the phrase "through service or otherwise" opens a universe of means besides service for putting the defendant in possession of the complaint. Limiting the triggering event to "service," on the other hand, would violate these words' broad meaning by trimming that universe down to a narrow spectrum of methods.

If a statute is clear, it means what it says.[5] We therefore join the other circuit courts that have confronted the issue and hold that the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means.[6] Here, the countdown began the day after the arrival of the faxed, file-stamped copy of the complaint in the hands of a responsible Murphy employee. The notice of removal came forty-four days later and was therefore untimely.

[3] 28 U.S.C. § 1446(b) (1994) (emphasis added).

[4] Webster's Third New International Dictionary 1894 (1986).

[5] See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).

[6] See Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 841 (5th Cir. 1996); Roe v. O'Donohue, 38 F.3d 298,303 (7th Cir. 1994); Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993).

The statute's clarity notwithstanding, two of Murphy's contentions merit further discussion. First, Murphy argues that this plain meaning contravenes the congressional intent reflected in the legislative history. It is true that "[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning."[7] But the phrase "receipt . . . or otherwise," as interpreted here, is not contrary to—or "demonstrably at odds" with, as the Supreme Court has put it[8]—the intent Murphy divines from the legislative history.

That history is as follows: before 1948, a defendant could remove a case at any time when, under state procedure, he could file a responsive pleading.[9] To homogenize practice from state to state, in 1948 Congress amended § 1446 to add a twenty-day (later thirty) deadline that ran from service of process.[10] A problem arose, however, in states such as New York where service of process could precede filing and service of the complaint. In these states, a defendant's removal time could expire before he saw the complaint and knew whether it contained a removable claim.[11] In 1949, Congress amended §1446 to the present "by receipt . . . or otherwise" language in order to

---

[7] Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995) (citing Hallstrom v. Tillarnook Co., 493 U.S. 20, 28-30, 110 S.Ct. 304, 310, 107 L.Ed.2d 237 (1989)); see Demarest v. Manspeaker, 498 U.S. 184, 190, 111, S.Ct. 599, 604, 112 L.Ed.2d 608 (1991).

[8] Demarest, 498 U.S. at 190, 111 S.Ct. at 604 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982).)

[9] Tech Hills II, 5 F.3d at 967.

[10] Act of June 25, 1948, ch. 646, § 1446(b), 62 Stat. 869, 939 (1948).

[11] Robert F. Faulkner, The Courtesy Copy Trap, 52 Md. L.Rev. 374, 39394 (1993)

eliminate this problem.[12] From this history, Murphy argues that the "receipt . . . or otherwise" language was not meant to have any effect outside of states like New York. Therefore, Murphy concludes, only in New York did receipt replace service as the triggering event.

The legislative history does not lead to that result. There were undoubtedly narrower ways of solving the New York problem than changing the triggering event from service to receipt. That does not mean, however, that the result in this case is necessarily "at odds" with what Congress meant to do. An at odds reading "thwart[s] the obvious purpose of the statute."[13] An interpretation that started the clock running before the complaint landed in the defendant' s hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice in all the States."[14] And the stated intent for the 1948 amendments was to make practice identical from state to state;[15] making other states different from New York thwarts that intention. So the plain meaning stands.

---

[12] Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 88, 101 (1949); see H.R.Rep. No. 81-352 (1949), reprinted in 1949 U.S.C.C.A.N. 1254, 1268.

[13] Commissioner v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

[14] S.Rep. No. 81-303 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1254 (emphasis added).

[15] See H.R.Rep. No.80-308 (1948), reprinted in 1948 U.S.C.C.A.N. spec. pamphlet at A135-36.

Murphy's second contention is that a receipt rule invites abuse by perfidious plaintiff's counsel, who will, Murphy claims, set "courtesy copy traps" for unwary defendants—in extreme cases eliminating the right to remove by sending unfiled draft complaints thirty days before filing them. The short answer is that no such abuse has occurred here; Michetti faxed a file-stamped copy of the complaint to a Murphy employee who knew enough to see that a response followed. Any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline, than Michetti's cunning.

The question of discouraging unjust tactics can thus be safely set "aside for consideration on a rainy day."[16] In any event, it appears unlikely that a plaintiff could eliminate the right to remove altogether by sending a draft complaint thirty days before filing it—until it is filed, a draft complaint is not the "initial pleading setting forth the claim for relief upon which such action . . . is based" that the defendant must receive to start the thirty-day clock.[17]

Conclusion

The district court's denial of the motion to remand is reversed and the action is remanded with instruction to the district court to remand the action to the Tenth Judicial Circuit of Alabama.

REVERSED and REMANDED WITH INSTRUCTION.

---

[16] Roe v. O'Donohue, 38 F.3d 298, 304 (7th Cir. 1994).

[17] 28 U.S.C. § 1446(b).

No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS
RIVES & PETERSON
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

5911

QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run from the date a named party receives a copy of the initial pleading, by any means and from any source, even if that named party has not yet been made a party defendant by service of process.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Court of Appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Legislative History

Miscellaneous Authorities

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (J.A. A-25) is reported at *Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396 (CA11 1997). The opinion of the United States District Court for the Northern District of Alabama (J.A. A-22) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 24, 1997. (J.A. A-25). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on February 23, 1998. (J.A. A-1). The petition for writ of certiorari was filed on May 26, 1998, and was granted on November 2, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, section 1446(b) provides, in pertinent part:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

STATEMENT OF THE CASE

On January 26, 1996, Michetti Pipe Stringing, Inc. ("Michetti") filed suit in the Circuit Court of Jefferson County, Alabama, seeking damages for breach of contract and fraud against Murphy Bros., Inc. ("Murphy"). (J.A. A-2). The case arises out of a dispute over payment for additional work allegedly performed by Michetti pursuant to a construction contract with Murphy.

A. The Negotiations

For many weeks prior to the filing of this suit, the parties had engaged in conversations and discussions attempting to resolve their dispute. These conversations and discussions were conducted between Murphy's Vice President - Risk Manager, Rick Moskowitz, and counsel for Michetti, J. David Pugh, Esq.

On January 29, 1996, in the midst of the negotiations, counsel for Michetti sent a letter, via facsimile transmission, to Rick Moskowitz and attached a "courtesy copy" of the filed complaint. (J.A. A-16 - A-17, A-2 - A-5). The letter stated:

> When we did not hear back from you last week after our conversation on Wednesday . . . we had no alternative but to file a complaint to preserve all of our rights. A copy of the complaint is enclosed.
>
> Please understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies. However, Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation. Accordingly, we are providing a courtesy [copy] of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter.

(J.A. A-17).

Mr. Moskowitz acknowledged receipt by letter dated January 30, 1996, setting forth his understanding of how the parties had agreed to proceed following their conversation on Wednesday and noting his belief that swifter action on his part would not have averted the suit which was filed so soon (on Friday) after their Wednesday conversation. Mr. Moskowitz concluded by stating:

> However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here [in Illinois], we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defenses and bar to the suit, whether in state court or removed to Federal District court. And, in Illinois, the remedy of sanctions is available to us for pleadings which are filed and found not to be in good faith when signed by either or both counsel and a party litigant.

(J.A. A-19).

The parties continued to correspond and discuss settlement possibilities until February 12, 1996, when service of process was perfected and Murphy refused to negotiate further.

B. Service and Removal

Service of process was perfected on Murphy on February 12, 1996, by certified mail service on its registered agent for service of process. (Circuit Court Case Action Summary p. 1). On March 13, 1996, Murphy removed the action to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1441. (J.A. A-6). The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 based on diversity of citizenship, Michetti being a Canadian company with its principal place of business in Nisku, Alberta, Canada and Murphy being an Illinois corporation with its principal place of business in East Moline, Illinois. (J.A. A-6 - A-7).

On April 3, 1996, Michetti moved to remand the case to state court. (J.A. A-9) Michetti argued that pursuant to the plain meaning of 28 U.S.C. § 1446(b) the time for removal begins to run from the defendant's "receipt ... through service or otherwise" of a copy of the complaint and that the removal was untimely because it was not filed within thirty days after Murphy

received the courtesy copy of the complaint via facsimile. (J.A. A-9 - A-14).

C. Denial of Remand

The district court denied the motion to remand, concluding that the removal period commenced when Murphy was served with process. (J.A. A-21). The court agreed with *City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), quoting:

> The 1949 addition [to section 1446(b)] supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served [a]long with the summons (Ala. R. Civ. P. 4).

(J.A. A-24). The district court concluded that the removal was timely because it was filed within thirty days after service of process. (J.A. A-21).

The district court certified the issue for interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit in an order dated May 1, 1996. (District Court Civil Docket, p. 2). That certification was renewed on September 17, 1996. (District Court Civil Docket, p. 2). The court of appeals granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b) by order dated December 5, 1996. (J.A. A-1).

D. Reversal by Court of Appeals

On October 24, 1997, the court of appeals reversed the district court. *Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396 (CA11 1997). (J.A. A-30). The court of appeals rejected the district court's conclusion that the "or otherwise"

language of the statute was not intended to have any effect in states where a copy of the complaint must be delivered when service of process is effected, finding that the meaning of the statute was clear. (J.A. A-27). The court found:

> An interpretation that started the clock running *before* the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice *in all the States*." And the stated intent for the 1948 amendments was to make practice identical from state to state; making other states different from New York thwarts *that* intention. So the plain meaning stands.

(J.A. A-29). The court concluded that "the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means." (J.A. A-27). The court held that the time period for removal in this case commenced when the faxed, courtesy copy of the complaint was received by Mr. Moskowitz on January 29, 1996, and that the notice of removal, filed forty-four days later, was untimely. (J.A. A-27). The court reversed and remanded the case with instructions to the district court to remand the action to state court. (J.A. A-30).

SUMMARY OF THE ARGUMENT

This case presents the issue whether service of process is a necessary prerequisite to the commencement of the 30-day time period for removal. Title 28, section 1446(b) requires that notice of removal be filed "within thirty days after receipt by the defendant through service or otherwise of a copy of the initial pleading...." 28 U.S.C. § 1446(b). Reading the language of §1446(b) in the context of the entire removal statute, considering the intent and purpose of Congress and interpreting the operative language consistently and in a manner that avoids conflict with other provisions leads to but one conclusion: the removal period commences only after service of process and receipt of the initial pleading.

Relying upon the plain meaning of the phrase "receipt ... through service or otherwise", the Eleventh Circuit concluded in this case that the thirty-day removal period begins to run from the defendant's receipt of the complaint, regardless of whether service of process has been perfected. At first blush, this plain-meaning analysis has some appeal, so long as the analysis focuses solely on the words "receipt ... through service or otherwise." However, the proper meaning of a statute cannot be ascertained from one phrase. When read in the context of the entire removal statute, as the rules of statutory construction require, the language of § 1446(b) is obviously ambiguous.

Although the meaning and scope of many of the terms used in § 1446(b) are open to question, probably the clearest indication of the statute's ambiguity results from the use of the term "defendant" in § 1441(b). Section 1441(b) provides that an action is removable, when federal jurisdiction is not based upon a federal question, "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b). Thus, the term "defendant" means a party who has been properly joined and

served. Rules of statutory construction dictate that identical words used in different parts of the same act be construed consistently. Applying the §1441(b) meaning of "defendant" to §1446(b), leads to the inescapable conclusion that receipt of the initial pleading by a party named as a defendant does not trigger the time for removal in the absence of service of process. A party who receives the complaint is not a "defendant" who is required to remove unless and until he is served with process. Consequently, service of process must be a prerequisite to the commencement of the removal period.

The Eleventh Circuit's "plain meaning" analysis cannot withstand scrutiny. Reading the language of § 1446(b) in the context of the entire removal statute indicates that both service of process and receipt are required prior to the commencement of the removal period. The legislative history of § 1446(b) and its interrelation with other laws supports this interpretation.

Prior to 1948, a defendant could remove a case at any time up to the time he was required to file a responsive pleading under state law. Because of wide variations in state law procedures, there was great disparity among the states as to the time period for removal. Consequently, when the Judicial Code was revised in 1948, Congress sought to establish greater uniformity in the time period allowed for removal. In that regard, § 1446(b) was enacted, requiring that removal take place within twenty days after commencement or service, whichever was later. However, this led to inequities in certain states like New York, where an action was commenced by service of a summons without any requirement that a complaint be filed or served. The time period for removal could expire before the defendant had access to the complaint from which to determine whether the action could or should be removed.

Congress sought to correct this problem by amending the statute in 1949. As amended, § 1446(b) required removal within twenty days of "receipt by the defendant through service or

otherwise of a copy of the initial pleading." Nothing in the legislative history suggests that this amendment was intended to require that a defendant remove an action prior to service of process. The amendment was intended to do nothing more than to assure that defendants in states like New York had access to the complaint before they had to decide whether to remove. If the 1949 amendment was intended to dispense with the need for service prior to removal, a relatively significant change in procedure, some discussion or reference to that fact surely would be found in the legislative history. The absence of any such reference clearly indicates that Congress intended that service of process would continue to be required prior to removal.

Interpreting § 1446(b) as abrogating the need for service prior to commencement of the removal period creates conflicts with other statutes and with Fed.R.Civ.P. 81(c). Such conflicts do not exist if service is required prior to removal. If the time for removal runs from receipt of the complaint without service of process, then a defendant could be required to remove a case at a time when he need not even be considered under § 1441(b) in determining whether the action is removable. Moreover, if the language of § 1446(b) is interpreted to require only receipt and not service, then the identical language in Rule 81(c), which was added at the same time and for the stated purpose of consistency, must also be so interpreted. If so interpreted, a defendant could be required to remove and to file a responsive pleading prior to service of process -- a result at odds with fundamental precepts of federal procedure. If Rule 81(c) requires service of process, logic dictates that § 1446(b) also requires service of process.

The service rule is the proper interpretation of § 1446(b). The language of this section, considered in the context of the other removal statutes, indicates that service of process is a necessary prerequisite to the commencement of the removal period. This interpretation is most consistent with the history of the statute and with the purpose for which the statute was amended. More-

over, this interpretation promotes consistency and avoids friction with other statutes and comports with notions of fundamental fairness upon which the removal statutes are based. Finally, the service rule interpretation of § 1446(b) provides a clear rule that is easily understood and applied.

Service of process and receipt are both required prior to commencement of the removal period. Murphy filed its notice of removal within thirty days of service of process. Consequently, the Court of Appeals erred in finding that the notice of removal was untimely. The judgment of the Court of Appeals should be reversed.

ARGUMENT

Section 1446(b) requires that notice of removal be filed within thirty days of "receipt by the defendant, through service or otherwise, of a copy of the initial pleading." For nearly fifty years the lower courts have struggled with the proper interpretation of this language. Two lines of authority have emerged. The "receipt rule" cases hold that the time period for removal begins to run upon receipt by the defendant of the initial pleading, regardless of whether service has been perfected and regardless of how the defendant comes into possession of the complaint. *See, e.g., Pic-Mount Corp. v. Stoffel Seals Corp.*, 708 F. Supp. 1113 (D. Nev. 1989); *Tyler v. Prudential Ins. Co.*, 524 F. Supp. 1211 (W.D. Pa. 1981). The "service rule" or "proper service" cases hold that the time period for removal begins to run only when the defendant has been served with process *and* has received a copy of the initial pleading. *See, e.g., Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D. S.C. 1996); *Love v. State Farm Mut. Auto Ins. Co*, 542 F. Supp. 65 (N.D. Ga. 1982).

The United States Court of Appeals for the Eleventh Circuit adopted the receipt rule in this case, joining the fifth, sixth and seventh circuits.[1] The district courts in the other circuits remain clearly divided on the issue.[2] Commentators also disagree as to

---

[1] *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839 (CA5 1996); *Roe v. O'Donohue*, 38 F.3d 298 (CA7 1994); *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963 (CA6 1993).

[2] *See, e.g., Joiner v. Kaywal Transp., Inc.*, 979 F. Supp. 1252 (W.D.Ark. 1997)(receipt rule); *Boyles v. Junction City Foundry, Inc.*, 992 F. Supp. 1246 (D. Kan. 1997) (receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D.S.C. 1996)(service rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D.Mo. 1996)(service rule); *Speilman v. Standard Ins. Co.*, 932 F. Supp. 246 (N.D.Cal. 1996)(receipt rule); *Colegio de Ingenieros y Agrimensores De Puerto Rico v. CNE Consulting, Inc.*, 896 F. Supp. 241 (D.P.R. 1995) (receipt rule); *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.

(Footnote 2 continued on next page)

the proper interpretation of §1446(b).[3] For the reasons discussed in detail below, the "service rule" is the proper interpretation of the statute. The judgment of the court of appeals in this case, therefore, must be reversed.

I. The language of 28 U.S.C. § 1446(b) is ambiguous.

The construction of any statute must begin with the language of the statute itself. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). If the meaning of the statute is clear and unambiguous, the language of the statute is conclusive, unless "'literal application of the statute will produce a result demonstrably at odds with the intention of its drafters.'" 489 U.S. at 242; (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982)). The proper meaning of a statute cannot be ascertained based solely upon the wording of one phrase. To the contrary, "in interpreting a statute, the court will look not merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983)(quoting *Brown v. Duchesne*, 19 How. 183 (1857)). "'A statute like any other living organism, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. ... The meaning of

---

(Footnote 2 continued)

Supp. 535 (E.D.Va. 1995)(receipt rule); *Apache Nitrogen Prod., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D.Ariz. 1993)(service rule); *Estate of Baratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992)(service rule); *Gates Construction Corp. v. Kochak*, 792 F. Supp. 334 (S.D.N.Y. 1992)(receipt rule); *Greensmith Co. v. Bearden*, 796 F. Supp. 812 (D.N.J. 1992)(receipt); *Hill v. Boston*, 706 F. Supp. 966 (D.Mass. 1989)(service rule).

[3] *Compare* Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992) *with* Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 Md.L.Rev. 374 (Winter 1993).

such a statute cannot be gained by confining inquiry within its four corners'." *United States v. Thompson/Center Arms Co*, 504 U.S. 505, 516 n.8 (1992)(quoting *United States v. Monia*, 317 U.S. 424, 432 (1943)(dissenting opinion)). Whether a statute is ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The language of § 1446(b), considered in the environment of the other removal statutes, is obviously ambiguous. Section 1446(b) states:

> The notice of removal of a civil action or proceeding shall be filed *within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading* setting forth the claim for relief upon which such action is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (emphasis added). The language of the statute raises numerous questions of interpretation: Who qualifies as a "defendant"?; What constitutes "receipt"?; What manner of "receipt" is encompassed within "service or otherwise"?; What is a "copy"?; What qualifies as an "initial pleading"? The terms used in § 1446 are not specifically defined in the removal statute, and they have been subject to varying and often conflicting interpretations in the lower courts.[4] Courts that have adopted

[4] *See* Robert F. Koets, Annotation, *What Constitutes "Initial Pleading" for Purposes of Computing Time for Removal of Civil Action from State to Federal Court Under 28 U.S.C.S. §1446(b)*, 130 A.L.R. Fed. 581 (1996); Brian Sheppard, Annotation, *When Does Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court to Run Under 28 U.S.C. § 1446(b)*, 139 A.L.R. Fed. 331 (1997).

the receipt rule have relied in large measure upon the "plain meaning" of the phrase "receipt ...through service or otherwise." *See, e.g., Pillin's Place, Inc. v. Bank One*, 771 F. Supp. 205 (N.D. Ohio 1991); *Conticommodity Servs., Inc. v. Perl*, 663 F. Supp. 27, 30 (N.D.Ill. 1987). However, the near half century of disagreement among the lower courts as to the proper interpretation of the statute belies any "plain meaning." To conclude that the statute has a plain meaning, one must focus only on the five words "receipt ...through service or otherwise" and ignore the other language of section 1446, its legislative history and the terminology of other removal statutes.[5]

Considering all the language of § 1446(b) in the context of the other removal statutes, the meaning of § 1446(b) is anything but plain. Although the phrase "receipt ... through service or otherwise" is at least arguably ambiguous in and of itself,[6] the language of § 1441 provides the clearest proof of the ambiguity inherent in the language of §1446(b).

Section 1441(b) provides that "any other such action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b) (emphasis supplied). The time period for removal under § 1446(b) does not begin to run until receipt by "the defendant" of a copy of the initial pleading. According to the language of § 1441(b), a "defendant" who must be considered for removal purposes is "a party in

[5] *See* Rohwer, *supra* note 3 at 370. ("To successfully determine that this statute is not ambiguous requires "the narrowest of vision; the statutory language must be taken outside the context of the surrounding statute and the other removal statutes; the language must be analyzed apart from the legislative and case law history; and definitions of terms must not be questioned.").

[6] Indeed, the words "or otherwise" used the statute have been described as "so vague as to have no meaning." *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D.Ala. 1990).

interest [who has been] properly joined and served." Rules of statutory construction dictate that the term "defendant" be ascribed the same meaning in § 1446 and in § 1441. *C.I.R. v. Lundy,* 516 U.S. 235, 250 (1996) (Interrelationship and close proximity of statutory provisions presented a classic case for application of normal rule of statutory construction that identical words used in different parts of same act are intended to have the same meaning); *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 568 (1995) (Acts of Congress should not be read as series of unrelated and isolated provisions; terms should be given consistent meanings throughout). Because an unserved party is not a "defendant" for purposes of removal, receipt of the complaint by a party named as a defendant cannot trigger the time period for removal in the absence of service of process. Certainly, the time period for removal cannot commence before a named party becomes a "defendant" for removal purposes. At the very least, the language of sections 1441(b) and 1446(b), when read together, demonstrates that ambiguity exists as to the meaning of §1446(b).

When such ambiguity exists, the Court must examine all available sources of information to ascertain the meaning of the statute. However, the purpose and intent of Congress in enacting the statute are key to the proper interpretation. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (when "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with the whole statute (or statutes on the same subject) and the object and policy of the law, as indicated by its various provisions and give to it such a construction as will carry into execution the will of the legislature").

II. The legislative history of 28 U.S.C. § 1446(b) and the historical context in which the 1949 amendment was adopted indicate that Congress intended to require both service of process and receipt before the time period for removal commences.

Beginning in 1944, Congress undertook to completely revise and recompile Title 28 and Title 18 of the United States Code. That effort culminated in the 1948 revision to Title 28 and Title 18. *See* 1948 U.S.C.C.S. 1487 (special pamphlet) (outline of history). The statutory provisions relating to the time for removal were revised and codified at 28 U.S.C. § 1446(b). Section 1446(b) was subsequently amended in 1949 to include the language that is at issue in this case requiring that removal take place within twenty days[7] of "receipt by the defendant, through service or otherwise, of a copy of the initial pleading."

Prior to the 1948 revision, a defendant could remove a case anytime before the expiration of his time to respond to the complaint under State law. The time limits for responding to a complaint varied from state to state. A defendant could have only 10 days after service to respond, and therefore to remove, in one state and 30 or 60 days to respond and remove in another state.

When the 1948 revisions to the removal statute were enacted,[8] Congress sought to establish uniformity in the time period for

---

[7] The statute was amended in 1965 to extend the time period from twenty days to thirty days. S. Rep. No. 712, *reprinted in* 1965 U.S.C.C.S. 3245.

[8] The changes made to the removal statute in 1948 were part of a complete revision and recompilation of Titles 18 and 28 of the United States Code. The legislative history of the 1948 revision is voluminous and was published as a special pamphlet of the United States Code Congressional Services. *See* 1948 U.S.C.C.S. 1487 (special pamphlet). The portions of the legislative history contained in the Special Pamphlet that relate specifically to 28 U.S.C. § 1446(b) are reprinted in the Appendix at A-3.

removal. Congress discarded the prior language and enacted § 1446(b), which required that the defendant remove within twenty days "after commencement of the action or service or process, whichever [was] later." 16 MOORE'S FEDERAL PRACTICE ¶ 107 App.01[1] (3d ed.). The reviser's note states that "subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later .... As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction." Reviser's Notes to 28 U.S.C. § 1446(b), *reprinted in* 1948 U.S.C.C.S. 1487, 1857 (special pamphlet); (App. A- 3).

It became apparent very quickly, however, that the 1948 version of section 1446(b) did not "give adequate time and operate uniformly" in all jurisdictions as Congress had anticipated. In New York, for example, a case could be commenced by serving the defendant with a summons without filing or serving a complaint. Under the 1948 revision, the removal period could expire before the defendant even received a copy of the complaint from which he could determine whether the case was removable.

The 1949 amendment to § 1446(b) was aimed at correcting the resulting inequities. Senate Report Number 303 notes:

> Section 83 of the bill as it passed the house makes a major change in the law concerning the removal of cases from State courts to Federal courts. In some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all States.

S. Rep. No. 303 (April 26, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1253-54 (emphasis supplied). *See also* H.R. Rep. No. 352 (March 30, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1268.[9] Professor James Moore, a special consultant to the Advisory Committee to the Committee on the Judiciary, explained the purpose and intention behind the 1949 amendment:

> Originally, § 1446(b) provided: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service or process, whichever is later." Since there are so many diverse state methods for the commencement of an action, and since in some states an action is commenced by the service of process and without the necessity of serving a complaint, the amendatory Act of 1949 revised § 1446(b) so that it would mesh better with all the divergent state practices, but *with the underlying principle of subsection (b) to remain undisturbed.* This principle is that the petition for removal of a civil action or proceeding is to be filed with the federal district court within a definite time period; and that the time period be a relatively short one.

James Wm. Moore, Moore's Commentary on the U.S. Judicial Code, ¶ 0.03(42), pp. 272-73 (1949) (emphasis supplied).

Integral to an analysis of this legislative history and to ascertaining Congress' purpose and intent in amending the statute is an understanding of the context in which Congress was acting. *See Steelworkers v. Weber*, 443, U.S. 193, 201 (1987)(statute

---

[9] The relevant legislative history with respect to the 1949 amendment to 1446(b) is reprinted in the Appendix at A-4– A-7.

must "be read against the backdrop of the legislative history ... and the historical context from which the Act arose"). Several factors are of particular significance in this regard. First, the starting point from which Congress undertook the 1948 revision was that the removal statutes - since the time the right of removal was first granted in 1789 - had always presupposed that service of process would be perfected prior to the time the defendandt was required to remove. See 28 U.S.C. §72 (1940); Judiciary Act of 1789, ch. 20, §12, 1 stat.73. Service of process was made an explicit requirement in the 1948 revision by tying the commencement of the removal period to commencement and service. In addition, it was well-established that due process requires service of process in order for a court to acquire jurisdiction over a party named as a defendant. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)("Service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."). The concept that a defendant's rights could not be prejudiced prior to the court's acquisition of personal jurisdiction by way of service of process was well-understood. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

Nothing in the legislative history of the 1949 amendment indicates that Congress intended to abrogate the requirement that service of process be perfected prior to the commencement of the time for removal.[10] As noted above, Congress' "point of reference" in considering the 1949 amendment was that a defendant

[10] In *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284, 1286 (W.D.Mo. 1996), the court recognized that the 1949 amendment was "designed as procedural safeguards, not as a tool for the circumvention of the well established rules regarding service of process." *See also Rodriguez v. Hearty*, 121 F. Supp. 125, 128 (S.D.Tex. 1954)(noting that the receipt rule would force out-of-state defendants to chose "between removing and waiving their right to proper service or waiting for service and waiving their right to remove").

need do nothing prior to service (1) because due process requires service before the court can exercise jurisdiction over a defendant and (2) because the removal statutes require service prior to removal. If Congress intended to abrogate that long-standing requirement of service prior to removal -- a significant change in procedure -- one would certainly expect some notation to that effect in the legislative history.

The legislative history and Professor Moore's commentary clearly indicate that the 1949 amendment was intended merely to toll the removal time in those jurisdictions where defendants do not have access to the complaint when they are served.[11] Congress sought to *delay* commencement of the removal period to assure that all defendants had a full twenty days to remove from the time they received a copy of the complaint when service already had been perfected -- not to *expedite* commencement of the removal period to assure that no defendant had more than twenty days to remove from receipt of the complaint before service was perfected. Congress was attempting to correct a problem that arose in only a few jurisdictions by reason of the fact that the defendant was not provided with a copy of the complaint when service was perfected. The logical means of correcting that problem was to *add* a requirement that the defendant receive a copy of the complaint, not to *discard* the service requirement completely. There is no suggestion in the history that Congress intended or anticipated that this revision would have the effect of displacing service as a prerequisite to removal. Significantly, the amendment was *not* intended to change the underlying principles behind § 1446(b). One of the

[11] The 1949 amendment included an alternative time period for removal. That alternative time period was added to deal with anticipated problems in jurisdictions where a suit could be commenced by filing a complaint, but service of process could be perfected simply by serving a summons alone. H.R. Rep. No. 352 (March 30, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1268.

principles underlying the removal statutes was that a defendant is not required to respond to the complaint or take any other action until after service of process is perfected and the court acquires jurisdiction over that defendant.

The legislative history of § 1446(b) indicates that the 1949 amendment was intended to add receipt as an additional prerequisite to the commencement of the removal period. This interpretation is much more consistent with the history and purpose of the 1949 amendment than is the receipt rule interpretation.

III. Interpreting § 1446(b) to require service and receipt avoids conflicts with other removal statutes and with the Federal Rules of Civil Procedure.

As discussed above, § 1441(b) limits the parties who must be considered in determining whether a case is removable to the parties in interest who have been properly joined and served as defendants. The exclusion of unserved and improperly joined parties from consideration in determining removability indicates that the time period for removal cannot begin to run until a party has been formally made a party defendant by service of process.[12] See *supra* pp.13-14.

Moreover, the interplay between § 1446(b) and § 1441(b) demonstrates that the receipt rule is at odds with Congress' intent. If the time for removal runs from the time a defendant receives the complaint, whether or not service has then been perfected, a named defendant could be required to remove a case (or lose his right to do so) at a time when he need not even be

[12] Section 1446(a) also reflects some expectation that service of process will be perfected prior to removal. That section requires a defendant to file a notice of removal and to attach to the notice "a copy of all process, pleadings and others served" upon the defendant. The language of § 1446(a) contemplates that at the tme of removal the defendant will have been served with "process, pleadings and orders."

considered in determining whether the action is removable under § 1441(b).

Further complicating matters with a receipt rule interpretation is the prevailing view that the time period for removal runs for all defendants concurrently.[13] With the receipt rule in place, *all* defendants could lose their right to a federal forum based on the actions of a defendant who has not been served (and perhaps cannot be served) and who need not otherwise be considered in the removal equation.[14] All the defendants could be deemed to have waived their rights to remove because of inaction on the part of a party who need not even be considered in determining whether the case is removable, nor join in the removal petition. Certainly, Congress did not intend this absurd result. No such problems arise if both service and receipt are required before the removal period commences.

The receipt rule also conflicts with Rule 81(c) of the Federal Rules of Civil Procedure. Rule 81(c) governs procedures after

[13] This Court has not considered whether a separate period for removal applies for each defendant or the time period runs concurrently for all defendants. However, the prevailing view appears to be that the removal period runs concurrently for all defendants beginning at the time it commences for the first defendant. *See Getty Oil Co. of Texas v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (CA5 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a] (3d ed.). *But see McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 928 (CA4 1992) (holding that each defendant has 30 days from date he is served to decide whether to remove or join in removal). If the first defendant waives his right to remove by allowing the removal period to expire, it precludes the other defendants from removing.

[14] Consider, for example, defendant One, who is provided a "courtesy copy" of a complaint which also names two other defendants. More than thirty days later, service is perfected upon defendants Two and Three. Defendant One need not be considered in determining whether the action is removable, and he is not required to join in the removal. However, Defendant One's failure to remove within thirty days of his early receipt of the complaint bars the other defendants from removing.

removal and contains the same language as §1446(b), requiring that a defendant respond to the complaint

> within 20 days after *receipt through service or otherwise of a copy of the initial pleading*..., or within 20 days after the service of a summons on such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever is longer.

FED. R. CIV. P. 81(c) (emphasis supplied). The emphasized language was added to Rule 81(c) and to section 1446(b) contemporaneously. The language was added to 81(c) for the expressed purpose of making the Rule consistent with section 1446(b).[15] Logic and accepted principles of statutory interpretation dictate that the language "receipt through service or otherwise of a copy of the initial pleading" was intended to mean the same thing in the statute and in the rule. *See C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996) (Interrelationship and close proximity of statutory provisions presented a classic case for application of normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning). Consequently, if mere receipt of the initial pleading is the proper interpretation of the language, as the court of appeals held in this case, then a named defendant can be required to remove a case and to respond to the complaint without ever having been served with process pursuant to either state or federal law.[16]

[15] The amendment to Rule 81(c) was effectuated shortly before the amendment to 28 U.S.C. § 1446(b). The Advisory Committee Notes to the proposed amendment to Rule 81(c) state: "The need for revision of the third sentence of [Rule 81(c)] is occasioned by the procedure for removal set forth in revised title 28, U.S.C. § 1446 ... The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment...." Committee Note of 1948 Advisory Committee's Proposed Amendment to Subdivision (c), *reprinted in* 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[18] (2d ed. 1992);(App.A-8).

Abrogation of the requirement of service of process, even if only in a limited number of cases, would be a profound change in procedure. If the receipt rule interpretation of the relevant language is the correct interpretation, it leads to the inescapable conclusion that this profound procedural change -- a change with possible constitutional implications -- was made without even a passing note or comment in the legislative history of the statute, the Supreme Court recommendation on adoption of the rule or the Advisory Committee Comments to Rule 81(c). The absence of any such note or comment is a clear indication that the "receipt rule" interpretation of the operative language is not what was intended.

Courts that have been called upon to interpret the relevant language in Rule 81(c) have recognized this problem and have concluded that the drafters could not have intended the "receipt by service or otherwise" language in the Rule to include receipt of the complaint in the absence of service of process. In *Silva v. City of Madison*, 69 F.3d 1368 (CA7 1995), *cert. denied*, 134

[16] At first blush it might appear that the second alternative time period ("20 days after the service of a summons on such initial pleading, then filed") would assure that service has been perfected before the defendant is required to file a responsive pleading. However, as originally proposed, the 1948 amendment to Rule 81(c) did not include this second time period. It was added when the Rule was adopted by the Court for the specific purpose of dealing with the problems arising from state procedural rules that allow service without any requirement that the complaint be attached or otherwise provided. The history of the Rule demonstrates that the second alternative was intended to apply only in jurisdictions where the procedural rules do not require delivery of the complaint. *See* Supreme Court Advisory Committee's Proposed 1948 Amendment to Subdivision (c); Supreme Court Advisory Committee Note of 1948 Proposed Amendment to Subdivision (c), and Explanatory Note to Rule 81(c) as Amended in 1948, *reprinted in* 7 Moore's Federal Practice ¶ 81.01[17] at 81-29 to 81-30, ¶ 81.01[18] at 81-30 to 81-31 & ¶ 81.01[19] at 81-31 to 81-32 (2d ed.). The referenced history is reprinted in the Appendix at A-7–A-11.

L.Ed.2d 522 (1996), for example, the Seventh Circuit held that service of process was necessary before a defendant was required under Rule 81(c) to file a responsive pleading. In reaching that conclusion, the court examined the history of Rule 81(c) and its relationship to section 1446(b) and concluded that the second alternative time period under Rule 81(c) (twenty days after service of summons upon an initial pleading then filed) did not apply in a state where the complaint must be served along with the summons when service of process is perfected.[17] 69 F.3d at 1375.

The court then was faced with deciding whether the first alternative time period under Rule 81(c), requiring a responsive pleading within twenty days after receipt of the complaint

---

[17] The court noted in this regard:

> Congress' amendment of §1446(b) and the amendment of Rule 81(c) addressed the identical concern -- if service were all that was required to trigger the time for removal, a defendant in a state that did not require delivery of the complaint in order to effectuate service might have to remove an action before he received the complaint. Accordingly, § 1446(b) was amended to require that a defendant have access to the complaint before he had to remove the action and, to be consistent with § 1446(b), rule 81(c) was amended to require that the defendant have access to the complaint before he had to file a responsive pleading.
>
> We believe the foregoing discussion [of the history of § 1446(b) and Rule 81(c)] demonstrates that, although the plain language of Rule 81(c) can be read to apply all three time periods set forth in the Rule to all removal cases, this interpretation is not compatible with the intent of the drafters of either § 1446 or of Rule 81. *It is clear that the second time period was not intended to apply in a state in which, when service is effected, the complaint is served along with the summons. See Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 143 (9th Cir. 1975) ("[W]e conclude that the second clause of rule 81(c) applies only to cases arising in states which do not require service of both a summons and complaint.").

Silva, 69 F.3d at 1374-1375 (emphasis supplied).

"through service or otherwise", applied if proper service had not been perfected. 69 F.3d at 1375. The court noted that because receipt of the complaint triggers both the removal period under § 1446(b) and the time period within which a responsive pleading must be filed under Rule 81(c), "a defendant could be required both to remove an action to federal court and to file a responsive pleading before proper service is effected." 69 F.3d at 1375. The court acknowledged that it had previously held in *Roe v. O'Donohue*, 38 F.3d 298 (CA7 1995), that the "plain language" of § 1446(b) must be applied to require that a defendant remove a case within thirty days of receipt of the complaint, regardless of whether service has been perfected. The court also acknowledged that "it could be argued" that the identical language in Rule 81(c) should be read in a manner consistent with the *Roe* interpretation -- that is, to require that the defendant file a responsive pleading within twenty days of receipt of the complaint regardless of whether service had been perfected. However, the court refused to apply the "plain meaning" interpretation of *Roe* to the language of Rule 81(c).[18]

> [W]e perceive nothing in the statute, the rule or their respective legislative histories that would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process. It simply is not reasonable for us to conclude that it was intended that such a major exception to the clear mandates of Rules 4 and 12 be undertaken without any express mention of such a consequence. It is one thing to require removal before service is effected; it is quite another to require a party to file a responsive pleading. Requiring

---

[18] In *Roe*, the court did not analyze the implications of the receipt rule on Rule 81(c). Rather, the court relied upon the plain meaning of the statute, noting that "courts are not authorized to disregard express language just because the legislative history does not echo 'and we really mean it!'" 38 F.3d at 303.

a responsive pleading before service is effected is at odds with a fundamental principle of federal procedure -- that a responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts. . . . As the court stated in *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D. Ariz. 1993), "[w]hile it is conceivable that Congress might wish to establish a different standard, outside the boundaries of Rule 12, to govern response time in removed actions ...[,] [i]t is unimaginable ... that such a significant alteration in the Federal Rules of Civil Procedure would be effected without mention by the Advisory Committee, the Supreme Court, or Congress itself." *Apache*, 145 F.R.D. at 680. ....

> Of course, the drafters might have decided to create a new service requirement to be used only in removal cases, one which does not comply technically with the traditional requirements of service in federal cases (Fed.R.Civ.P. 4) but which nonetheless meets the requirements of procedural due process. However, Rule 81(c) does not purport, either in its language or in its legislative history, to create any "new" service requirement. All that it requires is delivery of a complaint.

69 F.3d at 1376-77. Thus, the court read the language "receipt by service or otherwise of a copy of the initial pleading" in Rule 81(c) to impose no obligation upon the defendant to file a responsive pleading until after he is properly served with process.

The Seventh Circuit's analysis of Rule 81(c) is accurate. Nothing in the statute, the rule or their respective legislative histories justifies the conclusion that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process. *Silva*, 69 F.3d at 1377. However, the

Seventh Circuit failed to acknowledge the import of this conclusion on the analysis of § 1446(b). If the operative language was not intended to abrogate the requirement of service of process for purposes of the Rule, that same language clearly was not intended to abrogate the requirement of service of process for purpose of the statute either.[19]

Historically, service of process was required both prior to the time for removal and prior to the time to respond to a complaint. The amendments to the Rule and the removal statute were made for the same purpose, were made contemporaneously, and included the same language. To interpret the identical language differently is contrary to logic, reason and well-settled rules of statutory interpretation. *See Communications Workers of America v. Beck*, 487 U.S. 735, 745-47 (1988). Indeed, it is nonsensical to hold that language added to a statute and a rule in the same time period and for the purpose of consistency between the two was not intended to have the same meaning.

The interrelation between § 1446(b) and Rule 81(c) and the use of the identical language in the amendments to both documents demonstrates that the drafters assumed that service of process would be perfected before removal was required. Interpreting the statutory language to require both service of process

---

[19] In *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D. Ariz. 1993), the court considered the legislative history of both § 1446(b) and Rule 81(c) in analyzing the meaning of the operative language in Rule 81(c). Like the *Silva* court, the *Apache* court concluded from the legislative history that Congress did not intend to abrogate the requirement of service of process and that the "the twenty day response time under rule 81(c) does not commence until service has been effected." 145 F.R.D. at 680. However, unlike the *Silva* court, the *Apache* court found that the language in the statute and the rule must be interpreted in a consistent manner. Thus, the court concluded that the relevant language in the statute "does not eliminate the requirement that process be served before the thirty day period set by section 1446(b) commences to run." 145 F.R.D. at 680.

and receipt of the complaint avoids any conflict between the statute and the Rule. That interpretation best fulfills the purpose of the 1949 amendments and is in keeping with congressional intent. The service rule is the proper interpretation of the statute.

IV. The justifications cited for the receipt rule are unsound.

Courts that have adopted the receipt rule cite one or more of the following reasons in support of that interpretation of § 1446(b): (1) the plain meaning of the statute; (2) the principle that removal statutes must be read narrowly; and, (3) the need for uniformity. The cited reasons do not justify the conclusion that the receipt rule is the proper interpretation of § 1446(b).

Courts adopting the receipt rule almost always cite the plain meaning of the statutory language to justify their decisions. Indeed, the Eleventh Circuit notes that "[by and large, [its] analysis begins and ends with the three italicized words [receipt ... or otherwise]." (J.A. A-27). However, as demonstrated above, the language of 1446(b) is susceptible of no plain meaning. Considered in the context of the other removal statutes, the meaning of the statutory language is open to varying interpretations. *See Potter v. McCauley*, 186 F. Supp. 146, 149 (D.Md. 1960)("It is not possible to state definitely ... the precise scope and effect of the word 'otherwise' in its context here"). The clear split of authority on this question would not exist if the language had a plain meaning. As the *Apache* court appropriately observed:

> The reliance of courts and litigants on claimed "plain meaning" usually represents a conscious disregard of evidence that would lead to an undesired result, and not the existence of true unambiguity. To translate the words "service or otherwise" into terms of meaning requires looking to all available interpretive tools, and not simply relying on the false idol of "plain meaning."

145 F.R.D. at 679.

Another stated justification for the receipt rule is uniformity. *See Haun v. Retail Credit Co.*, 420 F. Supp . 859, 863 (W.D. Pa. 1976)(concluding that a standard based upon simple receipt of a copy of the initial pleading will "provide a uniform and definite time for a defendant to remove the action."). The Eleventh Circuit found that the service rule interpretation would thwart Congress' intent to make practice "identical"[20] from state to state. (J.A. A-29). However, the purpose of the 1949 amendment was *not* to make practice identical in every state, but to expand the removal time to correct the problems that had arisen by reason of the 1948 revision. Uniformity was the goal of the 1948 revision, not of the 1949 amendment.

Moreover, like many of the receipt rule cases, the Eleventh Circuit mistakenly assumes that Congress was seeking uniformity with respect to the time of the triggering event, and it reasons that retaining the requirement of service in addition to receipt would prevent uniformity because service rules differ between the states. However, the goal of the 1948 revision was uniformity in the time *period* allowed for removal. If Congress' goal had been uniformity of the time of the event triggering the removal period, it would not have chosen the later of commencement or service as the triggering event. In 1948, the state laws and rules regarding commencement and service of process varied tremendously -- much more so than they do now. The great majority of states now have adopted procedural rules modeled after or comparable to the Federal Rules of Civil

---

[20] The 1948 amendment was aimed at making practice *uniform* throughout the country, not at making practice identical. As a practical matter, making removal practice identical is impossible because the action is commenced in state court where rules regarding pleading and commencement of actions vary. Compare Ala.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court") with N.D.R.Civ.P.3 ("A civil action is commenced by the service of a summons.")

Procedure. If Congress had been seeking a uniform time for the commencement of the removal period, it certainly would not have tied the removal period to events that must be determined according to the varying provisions of state law. Congress' use of commencement or service in the 1948 revision negates any intent to establish a uniform trigger date for the commencement of the removal period. Consequently, any lack of uniformity caused by a service requirement is not contrary to the goal of either the 1948 revision or the 1949 amendment.

Retaining service of process as a prerequisite to removal does not compromise uniformity, in any event. It simply provides for uniformity on two levels -- service and receipt of the complaint -- both of which are required to trigger the removal period. In most jurisdictions those occur simultaneously, but both are required in *all* jurisdictions.

The receipt rule does not lead to greater uniformity than the service rule. As the Court found in *Estate of Barratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992):

> This court rejects the notion that reliance on receipt instead of proper service would result in a greater degree of uniformity in the federal system. First, I note that it would do so at the expense of state service rules which are in place to assure that the defendant receives notice sufficient to satisfy notions of due process and fair play. Second, it would essentially reward plaintiffs for effecting improper service. The "or otherwise" language of section 1446(b) was not intended to permit a plaintiff to substitute informal or improper service for the traditional requirements of personal service. ... Finally, and perhaps most importantly, it would not provide the clearest rule. Collateral litigation would surely result from arguments over whether the defendant "actually or constructively," received papers which were improperly served.[21] ... The simplest and fairest route is to hold that the removal period is not triggered until there has been proper service.

787 F. Supp. at 337 (citations omitted, footnote added). "[I]t seems safe to say that a standard which requires formal service of process promotes certainty far more effectively than one which accepts receipt 'otherwise' as its sole criteria." *Apache*, 145 F.R.D. at 679. The need for uniformity does not support the receipt rule.

The other regularly-cited justification for the receipt rule is the requirement that removal statutes are to be construed strictly and against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). This requirement leads the courts to interpret § 1446(b) in a manner that will most severely restrict the time period for removal. *See, e.g., Conticommodity Services, Inc. v. Perl*, 663 F. Supp. 27, 30-31 (N.D. Ill. 1987). This approach is flawed. *Shamrock Oil & Gas Corp. v. Sheets* holds:

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

313 U.S. at 109. This principle dictates that the federal court "not expand its jurisdiction beyond the precise limits set by Congress;" it does not require that "the federal courts do everything in their power to defeat defendants' efforts to remove, regardless

---

[21] As predicted, the receipt rule does lead to litigation over when receipt is sufficient to commence the removal time. Interestingly, the courts have employed service of process concepts in resolving these issues. *See, e.g., Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (CA6 1993)("We hold that delivery at defendant's place of business on a Saturday, when the offices are closed, to a security guard, who is not authorized to receive service on behalf of the corporation, is not receipt under the removal statute.").

of Congress' actual intent." *Apache*, 145 F.R.D. at 680. "[T]he Federal courts ... should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). Congressional intent for the 1949 amendment was expressed in the reviser's note as the intent to expand the removal time. Application of the strict construction rules emanating from *Shamrock Oil* is in contravention of the express legislative intent for this amendment. [22]

The justifications regularly cited in support of the receipt rule do not withstand scrutiny. They do not justify the conclusion that the receipt rule is the proper interpretation of § 1446(b).

V. The service rule interpretation of § 1446 is consistent with the language of the removal statutes and purpose and intent of Congress; it avoids conflicts with other removal statutes and the Federal Rules of Civil Procedure; and it comports with notions of fairness upon which the right of removal is grounded.

The service rule interpretation of § 1446(b) is much more consistent than the receipt rule with the legislative history of the statute and the purpose of the 1949 amendments -- that is, to assure that the time period for removal does not commence from the date of service where the defendant does not have access at the time of service to a copy of the complaint. Such an interpretation is also consistent with the perspective from which Congress approached the amendments -- that is, with the understanding that due process requires service of process before a defendant is required to respond to a complaint and that the removal statutes presuppose service of process prior to the time for removal. The service rule also avoids serious conflicts with the other removal statutes and the Federal Rules of Civil Procedure.

[22] *See* Rohwer, *supra* note 3 at 369.

"[T]he gravamen of removal is fairness."[23] "Congress seems to believe that the defendant's right to remove a case ... is at least as important as the plaintiff's right to the forum of his choice ... [T]he removal procedure is intended to be 'fair to both plaintiffs and defendants alike.'" *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 927 (CA4 1992)(citations omitted). Moreover, fairness concerns motivated the 1949 amendment to § 1446(b). The receipt rule promotes inequity rather than fairness. A defendant may be required to remove before he has been brought within the jurisdiction of the court and at a time when he has been lead to believe that the action is "on hold". By contrast, the service rule interpretation comports with the notions of fundamental fairness upon which the right of removal is based.

Finally, the service rule provides a clear rule that is easily understood and applied:

> Service of process is a bright line test which traditionally has been the foundation for commencement of an action and which provides the defendant the requisite due process notice that the action has commenced. ... [I]t clearly and succinctly defines the commencement of the removal period thereby dispelling any confusion among the parties and the court. A federal court applying the proper service rule generally has a well defined body of state law which delineates exactly what is "service of process" under the applicable state statute. ... [A] federal court can easily look to state statutes and case law and readily determine the triggering event commencing the thirty-day period. ... [A] much more uniform and logical approach would be for federal courts to rely on this established body of law instead of having to continually re-invent the wheel by attempting

[23] Rowher, *supra* note 3 at 361.

to define the not so plain and unambiguous "or otherwise" language of § 1446(b).

Bowman v. Weeks Marine, Inc., 936 F.Supp. 329, 340 (D.S.C. 1996).

All relevant factors demonstrate that the service rule is the proper interpretation of § 1446(b). The time for removal does not commence until service of process has been perfected on the defendant and the defendant has received a copy of the complaint. In the instant case, Murphy's time for removal did not commence until it received a copy of the complaint and was served with process. Service of process was perfected on February 12, 1996. Consequently, the removal, effected by notice filed on March 13, 1996, was timely. The district court properly denied Michetti's motion to remand. The Court of Appeals erred in reversing the district court's decision.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed and this case remanded for further proceedings in the district court.

Respectfully submitted,

DEBORAH ALLEY SMITH
Counsel of Record
RHONDA PITTS CHAMBERS

RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Deborah Alley Smith, a member of the Bar of this Court, hereby certify that on this 21st day of December, 1998, three copies of the Brief of Petitioner in the above-entitled case were shipped via Federal Express Priority Overnight, to the following:

Hobart A. McWhorter, Jr.
J. David Pugh
James F. Archibald, III
Bradley Arant Rose & White LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent

I further certify that all parties required to be served have been served.

DEBORAH ALLEY SMITH
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

APPENDIX

STATUTORY AND HISTORICAL APPENDIX

TABLE OF CONTENTS

REMOVAL STATUTES

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * *

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or

proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 81(c). Removed Actions.

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest....

LEGISLATIVE HISTORY OF 1948 REVISION TO TITLE 28

Reviser's Notes, *reprinted in* 1948 U.S.C.C.S. 1487, 1857 (special pamphlet):

Subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later, instead of "at any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead" as required by section 72 of title 28 U.S.C., 1940 ed. As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction. The provisions of sections 74 and 76 of title 28, U.S.C., 1940 ed., for filing at any time "before trial or final hearing" in civil rights cases and cases involving revenue officers, court officers and officers of either House of Congress were omitted.

Hearing Before Senate Subcommittee, No. 1, Statement of James William Moore, Professor of Law, Yale University, *reprinted in* 1948 U.S.C.C.S. 1487, 1969 (special pamphlet):

* * *

REMOVAL

Considerable improvement has been made in stating the procedure for removal. For example, the removal petition is to be filed first with the United States district court and no action by the State court is necessary. See section 1448. This effects a much more workable procedure and less conflicting points of view on jurisdiction than under the present practice where, in the main, the removal petition must first be presented to the State court, although its denial of the petition does not prevent the petitioner from removing the case to the Federal district court, and I believe considerable improvement has been made by

section 1441(c) relative to the removal of separable controversies and separate units -- a matter which is in great confusion at the present time.

LEGISLATIVE HISTORY OF 1949 AMENDMENT TO 28 U.S.C. § 1446

Senate Report No. 303, *reprinted in* 1949 U.S.C.C.S. 1248:

The Committee on the Judiciary, to whom was referred the bill (H.R. 3762) to amend title 18, entitled, "Crimes and Criminal Procedure," and title 28, entitled, "Judiciary and Judicial Procedure" of the United States Code, and for other purposes, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

PURPOSE

The purpose of the bill can be shown by quoting the following excerpts from the House report on this bill, as follows:

The bill incorporates in titles 18 and 28 of the United States Code, legislation which was enacted in the latter part of the second session of the Eightieth Congress, either just before or subsequent to the enactment of the revision of those titles on June 25, 1948. It corrects typographical and other minor errors, and clarifies the language of some sections to conform more closely to the original law, or to remove ambiguities which have been discovered. The bill also substitutes corrected phraseology in sections relating to the armed forces to conform to the reorganization of such forces; makes changes of nomenclature in other titles of the code to conform to new title 28; amends the section prescribing procedure for the removal of cases from State courts so as to make it fit the diverse procedural laws of the various States; and repeals inconsistent and superseded laws.

JUDICIAL CONFERENCE COMMITTEE CONTINUED

The Judicial Conference of the United States directed its Committee on Revision of the Judicial Code to continue to work with the revision staff. That committee, consisting of Circuit Judge Albert B. Maris and District Judges Clarence G. Galston and William F. Smith solicited suggestions from all the Federal judges. It asked that any ambiguities and errors which had been discovered in revised titles 18 and 28 be brought to its attention, but cautioned that no substantive changes could be considered in a correction bill.

* * *

[p. 1249] SUGGESTIONS RECEIVED

The Advisory Committee on the Federal Rules of Civil Procedure made constructive suggestions to harmonize the Civil Rules with the provisions of title 28 and amendments of the Civil Rules to this end were adopted by the Supreme Court on December 29, 1948, and reported to the present session of the Congress. Among these amendments is one relating to the removal of causes which follows the lines of the amendment made by section 83 of this bill to section 1446 of title 28.

* * *

[pp. 1253-54]

Section 83 of the bill as it passed the house makes a major change in the law concerning the removal of cases from State courts to Federal courts. In some states suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20

days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all the States.

House Report No. 352, *reprinted in* 1949 U.S.C.C.S. 1248, 1254:

[p. 1268]

SECTION 83 OF BILL

Subsection (b) of section 1446 of title 28, U.S.C., as revised, has been found to create difficulty in those States, such as new York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.

The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.

This provision, however, without more would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

The first paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure, relating to removed actions, adopted by the Supreme Court on December 29, 1948, and reported by the Court to the present session of Congress.

The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, Powers v. Chesapeake etc., Ry. Co., 169 U.S. 92.)

In addition, this amendment clarifies the intent of section 1446(e) of title 28, U.S.C., to indicate that notice need not be given simultaneously with the filing, but may be given promptly thereafter.

HISTORY OF FED. R. CIV. P. 81(c)

Advisory Committee's Proposed 1948 Amendment to Subdivision (c), *reprinted in* 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[17] (2d ed.):

The Advisory Committee proposed in 1948 that Rule 81(c), as amended in 1946, be further amended to read as follows (old matter to be stricken out is in brackets, new matter is in italics):

> (c) Removed Actions. These rules apply to civil actions removed to the [district courts of the United States] *United States district courts* from the state courts and govern [all] procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within [the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript] *20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceed-*

ing is based, or within 5 days after the filing of the petition for removal, whichever period is longer. If at the time of removal all necessary pleadings have been [filed] *served*, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the [record of the action is filed in the district court of the United States] *petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.*

The Committee's reasons for the proposed amendment are stated in its Note of 1948.

The Court, however, made some changes in this proposal before promulgating it.

Committee Note of 1948 to Advisory Committee's Proposed Amendment to Subdivision (c), *reprinted in* 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[18] (2d ed.):

Subdivision (c).--In the first sentence the change in nomenclature conforms to the official designation of district courts in Title 28, USC § 132(a); and the word "all" is deleted as superfluous. The need for revision of the third sentence is occasioned by the procedure for removal set forth in revised Title 28, USC, § 1446. Under the prior removal procedure governing civil actions, 28 USC, § 72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed "to answer or plead to the declaration or complaint of the plaintiff"; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under § 1446(a) removal is effected by a defendant filing with the proper United States district court "a verified petition containing a short and lain [sic] statement of

the facts which entitled him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action." And § 1446(b) provides: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and gives the defendant at least 5 days after removal within which [sic] his defenses.

The change in the last sentence of subdivision (c) reflects the fact that a transcript of the record is no longer required under § 1446, and safeguards the right to demand a jury trial, where the right has not already been waived and where the parties are at issue--"all necessary pleadings have been served." Only rarely will the last sentence of Rule 81(c) have any applicability, since removal will normally occur before the pleadings are closed, and in this usual situation Rule 38(b) applies and safeguards the right to jury trial. See Moore's Federal Practice (1st ed.) 3020.

Rule 81(c) as Amended in 1948 by the Court, *reprinted in* 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[19] (2d ed.):

The Advisory Committee's proposed amendment of 1948 to Rule 81(c), set out ... *supra*, was changed in a few respects by the

Court before promulgating the amendment. The Court's 1948 amendment of subdivision (c), as amended in 1946, changed (c) to read as follows (old matter stricken out is in brackets, new matter is in italics):

> (c) Removed Actions. These rules apply to civil action [sic] removed to the [district courts of the United States] *United States district courts* from the state courts and govern [all] procedures after removal. Repleading is not necessary unless the court so orders. In a removal action in which the defendant has not answered, he shall answer or present the other defenses or objections to him under these rules within [the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript] *20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon which initial pleading, then filed,* or within 5 days*

***Court's explanatory Note.--**

"The phrase, 'or within 20 days after the service of summons upon such initial pleading, then filed,' was inserted following the phrase, 'within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceedings is based,' because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of court. thus, [sic] he may never receive a copy of the initial pleading. The added phrase is intended to give the defendant 20 days after the service of such summons in which to answer in a removal action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20 day period does not begin to run until such pleading is actually filed. The last word of the third sentence was changed from 'longer' to 'longest' because of the added phrase."

> *after the filing of the petition for removal, whichever period is longest.* If at the time of removal all necessary pleadings have been filed [filed] [sic] *served*, a party entitled to a trial by jury under Rule 38 [and who has not already waived his right to such trial**] shall be accorded it, if his demand therefor is served within 10 days after the [record of the action in the district court of the United States] *petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.*

Committee Note of 1948 to Rule 81, *reprinted in* 7 MOORE'S FEDERAL PRACTICE ¶ 81App.04[2] (3d ed.):

Subdivision (c). --In the first sentence, the change in nomenclature conforms to the official designation of district courts in Title 28, U.S.C. § 132(a); and the word "all" is deleted as superfluous. The need for revision of the third sentence is occasioned by the procedure for removal set forth in revised Title 28, U.S.C. § 1446. Under the prior removal procedure governing civil actions, 28 U.S.C., § 72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed "to answer or plead to the declaration or complaint of the plaintiff"; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under § 1446(a) removal is effected by a defendant filing with the proper United States district court "a verified petition containing a short and

---

** "The phrase, 'and who has not already waived his right to such trial,' which previously appeared in the fourth sentence of subsection (c) of Rule 81, was deleted in order to afford a party who has waived his right to trial by jury in a state court an opportunity to assert that right upon removal to a federal court."

plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action." And § 1446(b) provides: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and gives the defendant at least 5 days after removal within which to file his defenses.

(8)

No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,

Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

J. DAVID PUGH
Counsel of Record
JAMES F. ARCHIBALD, III
SCOTT B. SMITH
BRADLEY ARANT ROSE
& WHITE LLP
Attorneys for Respondent
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

150977

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

38pp

QUESTION PRESENTED

Does a defendant's receipt, via facsimile, of a properly filed state court summons and complaint commence the time for removal under 28 U.S.C. § 1446(b), which plainly states that the "thirty days" for removal starts upon the defendant's "receipt" of the complaint "through service or otherwise"?

STATEMENT PURSUANT TO RULE 29.6

Michetti Pipe Stringing, Inc. has no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

STATEMENT OF THE CASE

Respondent Michetti Pipe Stringing, Inc. ("Michetti"), a Canadian corporation whose largest shareholder lives in Alabama, subcontracted with Petitioner Murphy Bros., Inc. ("Murphy"), an Illinois corporation, to perform work on a gas pipeline running from Alabama to Florida. J.A. 2. Michetti sued Murphy in Alabama state court, asserting claims for breach of contract and fraud to recover damages Michetti incurred due to construction delays and unforeseen conditions at the Alabama job site. J.A. 3-5. Michetti filed its complaint in the Circuit Court of Jefferson County, Alabama, on January 26, 1996. J.A. 2. At the time of filing, Michetti requested service of the complaint by certified mail. J.A. 5.

On January 29, 1996, Michetti's counsel sent Murphy's vice president-risk manager the summons and the file-stamped complaint by facsimile. J.A. 16-17. The next day, also via facsimile, Murphy acknowledged receipt of the complaint and expressed its intent to retain local counsel and remove the case "to Federal District court." J.A. 19. Michetti perfected service on Murphy pursuant to Alabama Rule of Civil Procedure 4 on February 12, 1996. J.A. 1. Murphy filed its notice of removal on March 13, 1996, forty-four days after its vice president-risk manager acknowledged receipt of the complaint and threatened to remove the case. J.A. 6-7.

Michetti moved to remand the case to state court because Murphy's notice of removal was untimely. The District Court denied this motion (J.A. 22-24), but, upon certification of the issue, the Eleventh Circuit reversed and ordered the District Court to remand the case to Michetti's chosen state forum (J.A. 25-30). Examining both the "plain meaning" of 28 U.S.C. § 1446(b) and its legislative history, the Court of Appeals held "that the thirty-day removal period begins to run when a

defendant actually receives a copy of a filed initial pleading by any means." J.A. 27-29. In so holding, the Eleventh Circuit joined the three other federal circuit courts that have confronted this issue. J.A. 27. The Fifth, Sixth, and Seventh Circuits have all read § 1446(b) to embody a "receipt rule" for the commencement of the defendant's time for removal. *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841 (CA5 1996); *Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (CA6 1993); *Roe v. O'Donohue*, 38 F.3d 298, 303 (CA7 1994).

The federal courts of appeals to address this issue thus unanimously begin the thirty-day removal period upon the defendant's "receipt . . . , through service or otherwise, of a copy of the initial pleading" showing the state case is subject to removal. 28 U.S.C. § 1446(b). Murphy petitions this Court to overrule this weight of authority and hold that the removal period begins only upon proper service of process under the applicable state law. Michetti, however, urges this Court to adopt the receipt rule, which tracks the language Congress wrote and implements a uniform federal standard for determining when the period for removing cases from state to federal court commences.

SUMMARY OF THE ARGUMENT

The receipt rule is the proper reading of 28 U.S.C. § 1446(b). It not only follows the text and structure of the statute, but also effectuates a uniform procedure for calculating the thirty-day removal period. Applying the receipt rule to the present case, Petitioner Murphy's removal was untimely because Murphy failed to file its notice of removal "within thirty days" after it "otherwise" received a file-stamped copy of the summons and complaint.

The text of § 1446(b) plainly requires the defendant to file its notice of removal "within thirty days after receipt" of the initial pleading "through service or otherwise." Murphy's reliance on "service" as the exclusive triggering event cannot be reconciled with the statute's next two words: "or otherwise." That should be the end of this case. To date, every appellate court to consider this issue has so held. Against this unambiguous language and weight of authority, Murphy petitions this Court to adopt the so-called proper service rule, thereby effectively rewriting § 1446(b) to read, "The notice of removal must be filed within thirty days of service of process." This interpretation cannot be correct, given the judicial amendment of the statutory text it would require.

Even if the text contained some ambiguity (which it does not), the legislative history confirms that Congress drafted § 1446(b) to establish a uniform federal standard, independent of state law. The edited version of the statute proposed by Murphy has more in common with the 1948 version of § 1446(b), which tied the removal period to "commencement of the action or service of process," than its 1949 amendments, in which Congress codified its preference for a uniform federal standard over one complicated by fifty different procedural systems. The Petitioner's proposed "proper service rule" thwarts the legislative intent by reincorporating the state service procedures that Congress deleted. By contrast, the receipt rule effectuates § 1446(b)'s legislative purpose by synchronizing the time for removal with the moment the defendant receives notice of a removable complaint, regardless of whether service is technically perfected under state law. Reading § 1446(b) as embodying a receipt rule implements a uniform federal standard grounded in the text, structure, and purpose of the statute. Any other interpretation would rewrite a jurisdictional removal statute which should be strictly construed.

ARGUMENT

I.

THE TEXT OF 28 U.S.C. § 1446(b) STARTS THE TIME FOR REMOVAL WHEN THE DEFENDANT RECEIVES NOTICE OF A REMOVABLE COMPLAINT "THROUGH SERVICE OR OTHERWISE."

"The time, the process, and the manner" of removal is subject to Congress's "absolute legislative control." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816). This basic tenet should end the inquiry. By wording the statute as it has, Congress has declared that receipt of a complaint through means other than service of process shall begin the time for removal. This has been the rule for fifty years. Any court that embraces the "proper service rule" undermines Congress's "absolute legislative control" over this subject. To the extent, as the petitioner and *amici* contend, the consequences of the rule or public policy dictate a different rule, those arguments are best directed to "Congress, not the courts." *Dunn v. CFTC*, 519 U.S. —, 137 L. Ed. 2d 93, 106 (1997). *See also Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

Congress drafted 28 U.S.C. § 1446(b) to commence the time period for removal when the defendant receives notice of a removable complaint filed in state court, regardless of the manner by which it is received. The first paragraph of § 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the *receipt* by the defendant, through service *or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (emphasis added).

Resolution of this case turns upon the statutory "language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The judiciary's task "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). In other words, when the language of a statute is clear, the first canon of statutory interpretation — "that a legislature says in a statute what it means and means in a statute what it says" — is also the last, and "judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Rake v. Wade*, 508 U.S. 464, 471 (1993) ("Where the statutory language is clear, our sole function . . . is to enforce it according to its terms.") (internal quotation omitted)). Strict construction is especially apt in the present case because § 1446(b) is a jurisdictional statute, a removal statute, and a deadline statute. *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (strict construction of jurisdictional statutes); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (strict construction of removal statutes); *United States v. Locke*, 471 U.S. 84, 93-94 (1985) (strict construction of deadline statutes).

The language of § 1446(b) is plain and straightforward. Congress emphasized "receipt" and placed "through service or otherwise" in a prepositional phrase set off by commas. Hence, the statute confirms that receipt of notice is the triggering event, not proper service. This conclusion also flows from Congress's

use of the word "otherwise," which Webster's defines simply as "in a different manner; in another way, or in other ways." *Webster's New International Dictionary of the English Language (Unabridged)* 1729 (2d ed. 1954). Because Murphy "otherwise" received a file-stamped copy of the summons and complaint but failed to file its notice of removal "within thirty days after the receipt," its removal was untimely under the plain and ordinary meaning of § 1446(b).

There is nothing ambiguous about this statute; its words are clear albeit sweeping. As long as the defendant has "otherwise" received notice of a removable action filed in state court, § 1446(b)'s the removal clock begins ticking. Murphy strives to transform the statute's breadth into ambiguity. But the fact that the time for removal may start "in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985). The statute is as broad as it is unambiguous, a fact confirmed by Congress's refusal to define or qualify "otherwise." *Cf. United States v. Monsanto*, 491 U.S. 600, 609 (1989); *Roe*, 38 F.3d at 303.

None of the four federal circuits to face this issue has had any difficulty deciding § 1446(b) means what it says. In the decision below, the Eleventh Circuit's analysis "beg[an] and end[ed] with the three italicized words": "*receipt* by the defendant, through service *or otherwise*." J.A. 27. The Sixth Circuit similarly found the interpretation of this "clear statutory language" to be "straightforward." *Tech Hills II*, 5 F.3d at 968. The Seventh Circuit held that "[a]ny other conclusion" drawn from this "express language" would "drain[] the words 'or otherwise' of meaning." *Roe*, 38 F.3d at 303-04. The Fifth Circuit agreed, concluding that "the plain language of § 1446(b)" begins the thirty-day removal period "when the defendant receives a copy of the initial pleading through *any*

means, not just service of process." *Reece*, 98 F.3d at 841. The extensive judicial editing of a congressional enactment needed to accomplish the "proper service rule" persuaded all the federal circuits to adopt the receipt rule instead.

Murphy now invites this Court to rewrite Congress's language to read, "The notice of removal of a civil action or proceeding shall be filed within thirty days after service of process of the initial pleading." Not only would the "proper service rule" require this Court to delete the phrase "or otherwise," it would also involve adding "of process" after the word "service" as well as excising the entire second half of the first paragraph, which alternatively starts the removal period with "service of summons upon the defendant if [the] initial pleading has then been filed in court." 28 U.S.C. § 1446(b). The fact that Congress made the first alternative more expansive (through its use of "through service or otherwise") than the second should be dispositive.

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.

Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). The argument that "proper service" is the exclusive means to start the thirty-day removal period simply cannot be reconciled with what § 1446(b) actually says.

The receipt rule not only implements the text of § 1446(b) as written, it also establishes manageable conditions for proper removal. Although the *amici* describe a "parade of horribles" that could result if Congress really meant "receipt . . . , through service or otherwise," the statutory text exposes these horribles

as mere hyperbole. For example, the removal period would not start if the defendant received a courtesy copy of an unfiled draft complaint, because such a copy would not be, in § 1446(b)'s words, an "initial pleading setting forth [a] claim for relief" in an "action or proceeding." *See* J.A. 30; *Kerr v. Holland America-Line Westours, Inc.*, 794 F. Supp. 207, 213 & n.5 (E.D. Mich. 1992); *Campbell v. Associated Press*, 223 F. Supp. 151, 153 (E.D. Pa. 1963). The same would be true if the filed complaint does not reveal the existence of federal subject matter jurisdiction, either because it failed to indicate the citizenship of the parties or the amount in controversy. *See* 28 U.S.C. § 1446(b) (second paragraph); *Wilson v. General Motors Corp.*, 888 F.2d 779, 782 (CA11 1989); *Essenson v. Coale*, 848 F. Supp. 987, 989 (M.D. Fla. 1994). An incomplete, illegible, or garbled complaint would be insufficient because such a document would not constitute a "copy." *Cf. Campbell*, 223 F. Supp at 153. Also, an unsigned copy would not be a valid "complaint" as required by Federal Rule of Civil Procedure 11. *See* 16 *Moore's Federal Practice* § 107.30[2][a][ii][A] (3d ed. 1998). *But see Reece*, 98 F.3d at 843. Sending a copy to an unauthorized employee of a corporate or governmental party would be improper "receipt" under Federal Rule of Civil Procedure 4. *See Tech Hills II*, 5 F.3d at 968. Similarly, if a defendant were to find a copy of the complaint on either a curb or a website, the defendant would not have actively "recei[ved]" a copy of the complaint from the plaintiff; mere passive discovery should not suffice. *Cf. Uni-Bond, Ltd. v. Schultz*, 607 F. Supp. 1361, 1364-65 (E.D. Wis. 1985); *Robert E. Diehl, Inc. v. Morrison*, 590 F. Supp. 1190, 1191 (M.D. Pa. 1984).

Of course, none of these hypotheticals have anything to do with the facts of this case, where the defendant's vice president-risk manager received a file-stamped copy of the summons and complaint and promptly expressed his company's intent to remove the case to federal court. It is hard to imagine a defendant *less* entitled to application of a "proper service rule"

on equitable grounds than Murphy. Nonetheless, to the extent the petitioner's and *amici*'s alleged inequities and policy concerns have any merit, they "cannot override . . . the text and structure of the Act." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

II.

THE LEGISLATIVE HISTORY OF § 1446(b) FAVORS A RECEIPT RULE BECAUSE CONGRESS INTENDED TO ESTABLISH A UNIFORM FEDERAL STANDARD, INDEPENDENT OF STATE LAW.

To overcome § 1446(b)'s text, Murphy argues extensively from the statute's legislative history, but that history provides no compelling reason to ignore the plain language of this statute. The burden is on the petitioner to explain why this Court should "depart from the literal text that Congress has enacted." *Brogan v. United States*, 522 U.S. —, 139 L. Ed. 2d 830, 835 (1998). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotation omitted). In other words, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute" like § 1446(b). *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989). "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

In any event, the legislative history of § 1446(b) cannot bear the strain of the petitioner's argument. Ironically, Murphy's rewritten statute has more in common with the 1948 version of § 1446(b) than it does with the current language. That version of the statute, enacted in 1948 as part of the

congressional overhaul of Title 28, set the time for removal by "commencement of the action or service of process, whichever is later." Pub. L. No. 80-773, § 1446, 1948 U.S.C.C.A.N. A1, A95. However, Congress quickly realized that tying the federal standard to state service of process rules was not working. As the House Report explained,

> Subsection (b) of section 1446 of title 28, U.S.C., . . . has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.

H.R. Rep. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, at 1268. Further difficulties arose

> in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant.

Id.

Consequently, Congress rewrote § 1446(b) in 1949 to substitute "receipt" of notice for "service of process." As the House explained, "this amendment . . . indicates that notice need not be given simultaneously with the filing, but may be given promptly thereafter." *Id.* Under the 1949 amendments, notice occurs either upon the defendant's "receipt," "through service or otherwise, of a copy of the initial pleading," or when "service of summons upon the defendant" occurs, provided the "initial pleading has then been filed in court and is not required to

be served on the defendant." Pub. L. No. 81-72, § 83, 1949 U.S.C.C.A.N. 94, 107.

Congress understood that making notice the triggering event was "a major change in the law concerning the removal of cases from state courts to federal courts." S. Rep. No. 81-303 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, at 1253-54. To avoid the anomalies of state service of process rules, Congress chose language that "will meet the varying conditions of practice in all the States." *Id.*, 1949 U.S.C.C.A.N. at 1254. The Senate Report makes it apparent that receipt of either actual or constructive notice is sufficient to trigger the time period, explaining that

> a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for.

Id.

The more persuasive reading of § 1446(b)'s legislative history is that Congress divorced federal removal procedure from the technicalities of state law to correct the mistake it had made in 1948. The speed with which Congress rewrote the statute corroborates this reading. While "proper service" may have been the rule in 1948, Congress changed § 1446(b) to a "receipt" of notice rule in 1949. As the Seventh Circuit concluded,

> by emphasizing the link between possessing a copy of the pleadings and the time for removal, the 1949 deliberations strongly suggest that we should take "or otherwise" seriously: knowledge of the nature of the claims, and not the state's technical rules of service, determines timeliness.

Roe, 38 F.3d at 303. Presumably the petitioner wants this Court to undo what Congress deliberately did when it amended § 1446(b). When Congress amends the United States Code, it completely erases the underlying language; rewriting what Congress has erased is outside the judiciary's purview. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

While Congress may have drafted the current version of § 1446(b) to cover exceptional states like New York and Kentucky, it established a uniform federal rule that transcends the vagaries of state procedural law. The statute's reference to receipt of notice "through service or otherwise" is unqualified. This Court does not make it a practice "to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other that the text of the statute itself." *Brogan*, 139 L. Ed. 2d at 837. Although state service of process rules may stand in the background of § 1446(b), as revealed by the legislative history, the statutory text still governs. Statutes "often go beyond the principal evil to cover reasonably comparable evils," but "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. —, 140 L. Ed. 2d 201, 207 (1998).

By tying the commencement of the removal period to state service of process law, the "proper service rule" thwarts the uniformity that Congress hoped to achieve with its 1949 amendments to § 1446(b). Congress intended to establish a uniform removal period triggered by the defendant's receipt of notice of a removable action, regardless of whether the complaint has been properly served in accordance with a given

state's service rules. In the final analysis, the receipt rule is the most effective way of implementing the express language Congress used to amend § 1446(b) as well as the legislative purpose behind those amendments.

III.

SECTION 1441(b) DOES NOT MAKE SECTION 1446(b) AMBIGUOUS.

Murphy's attempt to escape the text of § 1446(b) by juxtaposing it against § 1441(b) also fails. The two provisions are entirely consistent. Murphy claims that § 1441(b) defines the word "defendant" as a party who is properly joined with service of process. This definition, according to Murphy, not only clarifies the meaning of "defendant" in § 1446(b), but it also renders "receipt . . . through service or otherwise" ambiguous. Murphy has misread § 1441(b). Section 1441(b) does not define "defendant"; it merely eliminates the right to remove if one of the "parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." If Murphy's purported § 1441(b) definition is substituted for "defendant" in § 1446(b), § 1446(b) would state, "[t]he notice of removal . . . shall be filed within thirty days after the receipt by the [parties in interest properly joined and served as defendants], through service or otherwise, of a copy of the initial pleading. . . ." This nonsensical construction confirms that Congress did not intend to define "defendant" in § 1441(b). *See Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd has long been a judicial function").

If § 1441(b) were intended to define "defendant" for all removal statutes, it would say "a defendant, for purposes of removal, is a party properly joined and served." It does not say

that. That Congress felt it necessary to utilize the phrase "parties properly joined and served as defendants" instead of the word "defendants" proves that proper joinder and perfected service of process are not prerequisites for creating a "defendant." Indeed, because Congress included proper joinder and service to modify "defendant" in § 1441(b) but excluded those same modifiers in § 1446(b), the "disparate inclusion and exclusion" must be given effect. *See Gozlon-Peretz*, 498 U.S. at 404.

A party being sued may have defenses based on improper joinder or improper service of process, but that does not mean the party is not a "defendant." This Court held long ago that service of process is not necessary for a party to be viewed as a "defendant." *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). In *Pullman*, this Court held that a named resident defendant defeated diversity removal, even though the resident defendant had not been served at the time of removal. *Id.* at 541. While the Court recognized that this rule might prejudice removing defendants if a resident co-defendant were never served, the Court explained that diversity of citizenship does not exist where a resident co-defendant is named in the complaint. *Id.*

Congress amended § 1441(b) in 1948 to prevent in-state defendants, "properly joined and served," from removing cases to federal court. Pub. L. No. 80-773, § 1441, 1948 U.S.C.C.A.N. A1, A93. The amendment does not change *Pullman*'s holding, however, because the amendment to § 1441(b) must be read against the general principle contained in § 1441(a). *Pecherski v. General Motors Corp.*, 636 F.2d 1156, 1160 (CA8 1981); *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (CA9 1969). Section 1441(a) restricts removal jurisdiction to include only those cases that could have been filed originally in the federal court. Accordingly, the specific amendment to § 1441(b), barring in-state defendant removal, does not alter the more general requirement of complete diversity imposed

by § 1441(a). This holds true even where the resident defendant is unserved at the time of removal, because complete diversity would be lacking despite the flaw in service. *See Pecherski*, 636 F.2d at 1160; *Clarence E. Morris, Inc.*, 412 F.2d at 1176.

Section 1441(b) cannot bear the strain of Murphy's argument. To argue that a provision barring in-state defendant removal means that a defendant must be properly served to be a "defendant" stretches § 1441(b)'s language past the breaking point. Even if it could sustain such pressure, § 1441(b) would not support rewriting § 1446(b)'s "receipt, through service or otherwise" into the proper service rule. Nothing in § 1441(b) makes § 1446(b) ambiguous. "The mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) (internal quotation omitted).

IV.

READING SECTION 1446(b) AS A RECEIPT RULE DOES NOT VIOLATE DUE PROCESS.

In a final attempt to preserve its removal, Murphy tries to make service of process a component of due process. This argument does not withstand scrutiny. The receipt rule does not threaten any due process rights. In making due process objections to the receipt rule, Murphy and the *amici* repeatedly confuse service of process with personal jurisdiction. The two are entirely separate concepts with distinct procedural consequences. While personal jurisdiction is a component of due process, the technicalities of service of process are not. *See* 5A *Wright & Miller, Federal Practice and Procedure: Civil 2d* § 1391, at 756 (1990). The lack of personal jurisdiction raises constitutional due process issues that are not waived by the

defendant's failure to appear. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). In contrast, objections based on defective or improper service of process do not implicate constitutional due process concerns and, therefore, are waived by a defendant who fails to raise them in timely fashion. *See* Fed. R. Civ. P. 12(h)(1); *Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897, 900 (CA11 1990). This explains why personal jurisdiction provides valid grounds to attack a judgment collaterally, but improper service of process does not similarly excuse a default.

The defendant's right to remove a diversity case to federal court does not implicate due process. Indeed, waivers of removal rights are tolerated routinely where due process has not necessarily been afforded. For example, if one defendant waives its removal rights, it does so for itself and likely for all subsequently served defendants, even if those defendants had no knowledge whatsoever of the waiver when it occurred. *See* Brief for Petitioner at 21 n.13 (collecting cases). Similarly, a party may agree to an enforceable forum selection clause in a contract that waives its right to removal, even though, at the time of the waiver, the party had no knowledge of any disputes, no knowledge of whether the disputes would entitle it to a federal forum, and no knowledge of whether any tactical reasons existed for being in federal court. *See Milk "N" More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (CA10 1992).

Any attempt to glorify the defendant's right to seek diversity-based removal fails. As this Court recognized in *Shamrock Oil*, Congress's purpose since 1887 has been to restrict the removal jurisdiction of the federal courts. 312 U.S. at 108-09. Since *Shamrock Oil* was decided, Congress has increased the amount-in-controversy requirement for diversity removals to $75,000. 28 U.S.C. § 1332. It has eliminated a resident defendant's right to remove on the basis of diversity under § 1441(b) as well as a

defendant's right to remove a case after one year has elapsed under § 1446(b). Furthermore, the defendant has almost no right to seek appellate review of a remand order. 28 U.S.C. § 1447(d). The ever-shrinking scope of diversity removal conclusively rebuts any suggestion that a defendant's fundamental due process rights are somehow undermined by the receipt rule.

Even if due process concerns were implicated by this case, the defendant's rights are adequately protected by the United States Code and the Federal Rules of Civil Procedure. When the defendant receives a copy of the complaint, through whatever means, it can easily assess whether it has grounds to remove the action to federal court, and it can satisfy the requirement of setting forth a "short and plain statement of the grounds for removal," as demanded by 28 U.S.C. § 1446(a). Proper service in accordance with state procedural rules adds nothing. If the defendant has the complaint in hand, *through service or otherwise*, it has sufficient information to determine whether it can and should remove. This point is demonstrated amply by Murphy, who, within one day of receiving a faxed courtesy copy of Michetti's summons and complaint, wrote a letter explaining its strategy for defending the case, which included removal to federal court. J.A. 19. There was no reason for Murphy to wait until 30 days after *service* to remove.

A state court defendant in receipt of a removable complaint loses nothing by exercising its right to remove within thirty days after receiving a courtesy copy of the complaint, even if it has not yet been formally served. Filing a notice of removal is the modern equivalent of a "special appearance." *See General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 268-69 (1922). All defenses, including defenses to personal jurisdiction, are reserved and can be contested in the federal court. *See* 28 U.S.C. § 1441(e); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 n.4 (CA2 1996). Indeed, Rules 12(b)(4) and (5) empower the removing defendant to challenge service of

process and adequacy of process, and those defenses are not waived upon removal. *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 133-34 (1914) (holding the validity of service of process may be challenged in federal district court following removal).

Federal Rule of Civil Procedure Rule 81(c), discussed at length by Murphy and the *amici*, gives the removing defendant at least five more days after filing the notice of removal to file a responsive pleading. Rule 81(c)'s use of "receipt through service or otherwise" means that the defendant who decides to exercise its removal rights might be required to file a responsive pleading in the federal court before formal service of process. Murphy and the *amici* vociferously object to this possibility. But Rule 12 provides the defendant with a simple, yet effective procedural option. Instead of filing an answer to the merits of the complaint, the unserved defendant, within five days after removing the case, can file a motion to dismiss under Rules 12(b)(4) and (5). That motion, which attacks the sufficiency and adequacy of process, enables the defendant to put off answering the merits of the complaint until proper service has been perfected. In this manner, the defendant preserves not only its federal forum, but also its right to insist upon proper service of process. The receipt rule sacrifices none of the defendant's procedural options once the case arrives in federal court.

CONCLUSION

Every Circuit Court of Appeals to address this issue has held that the defendant's actual receipt of the complaint, whether by formal service or otherwise, commences the thirty-day removal period set by 28 U.S.C. § 1446(b). This unanimity reflects the clarity of Congress's language as well as its intent to create a uniform federal rule, separate from the technicalities governing state service of process. As the weight of authority holds, the receipt rule is the proper reading of § 1446(b). This Court should therefore affirm the decision below.

Respectfully submitted,

J. DAVID PUGH
Counsel of Record
JAMES F. ARCHIBALD, III
SCOTT B. SMITH
BRADLEY ARANT ROSE
& WHITE LLP
Attorneys for Respondent
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

(9)

No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS
RIVES & PETERSON
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

15pp

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Court of Appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The issue in this case is whether service of process is a necessary prerequisite to the commencement of the thirty day removal period. Michetti argues that Murphy is inviting the Court to "rewrite Congress's language to read, 'The notice of removal of a civil action or proceeding shall be filed within thirty days after service of process of the initial pleading.'" (Brief for Respondent, p.7). Indeed, Michetti's entire argument is focused upon refuting the idea that service, rather than receipt, is the event that triggers the removal period.[1] Murphy, however, does not contend that the statute requires service *rather* than receipt. Murphy's position is that *both* service *and* receipt are required to trigger the removal period.[2]

Michetti suggests that the equities are not in Murphy's favor in this case. If weighing the equities is the standard for determining the timeliness of removal, then this case should be remanded to the district court to weigh the equities after conducting an

---

[1] Because Michetti misinterprets Murphy's position, much of its argument is misdirected. Michetti claims, for example, that a service rule interpretation would "excise" the alternative commencement provision contained in the second phrase of §1446(b). To the contrary, if the statute requires service and receipt, the alternate provision would still be necessary in order to deal with those jurisdictions like Kentucky "where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant" at any time. H.R.Rep. No. 352 (March 30, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1268. Without this alternative commencement provision, the removal period might *never* begin to run in such a jurisdiction. *Id.*

[2] Notwithstanding the implications of the titles "service rule" and "proper service rule," the cases require both service and receipt. *See Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 679 (D.Ariz. 1993)("the removal period does not commence until process has been served *and* a copy of the initial pleading has been provided, whether it be through service 'or otherwise'").

evidentiary hearing.[3] The equities are not at issue here, however. The issue in this case was decided by both the district court and the court of appeals as purely a legal issue — not an equitable one.

As demonstrated in Murphy's principal brief, the service rule interpretation is consistent with the history of the statute; it prevents conflicts with other statutes; and it comports with notions of fundamental fairness upon which the removal statutes are based. It is the correct interpretation of § 1446(b).

I. The language of 28 U.S.C. § 1446(b) is ambiguous.

Predictably, Michetti argues that § 1446(b) is clear and unambiguous. Focusing the Court's attention on the phrase "receipt .... through service or otherwise," Michetti claims that the "plain meaning" of the statute precludes any judicial interpretation. However, rules of statutory interpretation require that the Court look beyond this one phrase and consider all the language of § 1446(b), as well as the removal statutes as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). When

[3] Michetti suggests that Murphy's knowledge of its right to remove tips the balance of the equities in its favor. To the contrary, the fact that Murphy knew of and expressed its intent to remove the case to federal court clearly demonstrates the *inequity* of the situation. Murphy assumed, like most litigants and many lawyers would, that it did not have to take any action to protect its interests in relation to Michetti's suit until service of process was perfected. Certainly, it had a reasonable basis for so assuming. After all, one of the fundamental precepts of our legal system is that a court cannot exercise jurisdiction over a defendant, nor may a defendant's rights be prejudiced, until the court acquires personal jurisdiction over the defendant via service of process. Moreover, Michetti led Murphy to believe that it had filed this suit only to protect its interests and that it wanted to continue to discuss a resolution of the parties' dispute. Taking Michetti at its word, Murphy continued with settlement negotiations until it was served with process and refused to negotiate further. Michetti certainly would not prevail in a battle of the equities.

viewed in this context, the meaning of § 1446(b) is anything but plain.

The meaning of the statute is unclear in many respects. Most significantly, the intended meaning of "defendant" is uncertain. If used broadly, "defendant" means any party the plaintiff names in the complaint. If used narrowly, "defendant" means only named parties who have been formally joined as defendants by service of process, as the term is utilized in § 1441(b). Indeed, Webster's dictionary defines "defendant" as "the defending party" or, more broadly, as "one who is sued or accused." Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979). Because the term "defendant" is reasonably susceptible of either meaning in the context of § 1446(b), ambiguity exists.

In its attempt to discount as "mere hyperbole" what it dubs the "parade of horribles" that could result from the receipt rule, Michetti actually highlights other ambiguities of the statute.[4] For example, Michetti states that "Sending a copy to an unauthorized employee of a corporate or governmental party would be improper "receipt" under Federal Rule of Civil Procedure 4." (Brief for Respondent, p. 8). Section 1446(b) does not limit "receipt" by a corporate or governmental party to those circumstances meeting Rule 4's requirements.[5] Michetti also notes that "if a defendant were to find a copy of the complaint on either a curb or a website, the defendant would not have actively

[4] Interestingly, Michetti does not hesitate to embellish the language of the statute in its attempts to demonstrate why the "parade of horribles" are not so horrible, though it roundly criticizes Murphy's interpretation as improperly "adding" language to the statute.

[5] Rule 4 addresses service of process, specifying that "[a] summons, or copy ..., shall be issued for each defendant to be served," Fed. R. Civ. P. 4(b), and that the "*summons shall be served* together with a copy of the complaint." Fed. R. Civ. P. 4(c)(1) (emphasis added). If the requirements of Rule 4 are incorporated into section 1446(b), then service of process should be required.

"recei[ved] a copy of the complaint from the plaintiff; mere passive discovery would not suffice." (Brief for Respondent, p. 8). Nothing in the statute requires that the defendant "actively" receive a copy of the complaint "from the plaintiff." The term "receive" does not necessarily imply such a requirement. *See* Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979)(defining "receive" as "to take into one's possession"; "to get"; "to acquire"). While Michetti's proposed interpretations may be reasonable, they do not flow necessarily from the language of the statute.

In short, the language is susceptible of more than one meaning — it is ambiguous. *Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607, 611 (CA8 1998)(a statute is ambiguous if it is reasonably susceptible of more than one interpretation). *See also* Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979)(defining ambiguous as "having two or more possible meanings; . . . susceptible of different interpretations; hence, obscure; not clear; not definite; uncertain or vague"). These ambiguities require that the Court examine all available sources of information to ascertain the statute's intended meaning. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

II. The legislative history of 28 U.S.C. § 1446(b) and the historical context in which the 1949 amendment was adopted indicate that Congress intended to require both service of process and receipt before the time period for removal commences.

Michetti argues that the legislative history of section 1446(b) supports the receipt rule interpretation, but in so doing, Michetti so jumbles and confuses the legislative history that it is virtually unrecognizable.[6] Michetti quotes from various portions of the

[6] Those portions of the legislative history of the 1948 revision and the 1949 amendments to Title 28 which refer to section 1446(b) are reproduced in their entirety in the appendix to Murphy's principal brief at pages A-3 - A-7.

legislative history that address different and distinct aspects of the statute[7] and concludes from its mis-connection of these snippets from the legislative history that the 1949 amendment substitutes "'receipt' of notice" for service of process. (Brief for Respondent, pp. 10-11). Neither the statute nor its history suggests that "either actual or constructive notice" is generally sufficient to trigger the time period," as Michetti suggests. Indeed, under the language of the statute "notice" is sufficient only in the narrow circumstance where service of a summons has been perfected, the complaint has been filed and the complaint is not required to be served on the defendant.[8] Aside from that narrow circumstance, actual receipt of the complaint is required. Nothing in the legislative history indicates that Congress intended or foresaw that the removal period could commence prior to service of process.

The goal of the 1948 revision to section 1446(b) was to establish a uniform time period within which the right of removal must be exercised. If divorcing removal from the procedural variations of state service of process rules had been Congress' aim, it certainly would not have tied the removal period to commencement or service under state law. Congress soon

[7] Michetti states, for example:

> Congress rewrote § 1446(b) in 1949 to substitute "receipt" of notice for "service of process". As the House explained, "this amendment . . . indicates that notice need not be given simultaneously with the filing, but may be given promptly thereafter. [H.R. Rep. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, at 1268]

(Brief for Respondent, p. 10). Though the point of this argument is unclear, the extent to which Michetti tortures the legislative history is not. The quoted section of the House Report addresses an amendment to § 1446(e) [which is now 1446(d)] dealing with notifying adverse parties of the removal. *See* A-7.

[8] The number of entries in the "parade of horribles" increases exponentially as Michetti's proposed interpretation shifts from actual receipt to constructive notice.

realized, however, that the time period was not uniform under the 1948 revision because in jurisdictions such as New York where a case could be commenced by serving the defendant with a summons without filing or serving a complaint, the removal period could expire before the defendant had received a copy of the complaint from which he could determine whether the case was removable. Consequently, the 1949 amendment was effected to assure that defendants in "New York rule" jurisdictions, like defendants elsewhere, would be afforded twenty days to decide whether to remove.

Thus, like the 1948 revision, the 1949 amendment was aimed at achieving uniformity in the time *period* for removal. The intent of the amendment was not to sever all ties to state service of process rules, as Michetti suggests. The service rule interpretation of the statute, therefore, does not thwart congressional intent. In fact, it is the receipt rule that runs counter to congressional intent because it accelerates the commencement of the removal period when a named defendant receives the complaint prior to service, when the purpose of the amendment was to delay commencement of the period in "New York rule" cases. In short, the 1949 amendment was not intended to dispense with service of process as a prerequisite to removal, but simply to add receipt as an additional requirement.[9]

[9] Michetti notes that Congress understood that the 1949 amendment would effect a "major" change in the law. (Brief of Respondent, p.11). The amendment to § 1446(b) was a "major" change in the context of the 1949 legislation only because it actually modified the law, whereas the great bulk of the 174 changes that were made through the legislation merely corrected clerical and typographical errors or revised language to conform more closely to former law. S.Rep. No. 303 (April 26, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1252.

III. Interpreting § 1446(b) to require service and receipt avoids conflicts with other removal statutes and with the Federal Rules of Civil Procedure.

As noted previously, the phrase "parties in interest properly joined and served as defendants" in § 1441(b) suggests that the term "defendant" in § 1446(b) includes only those named parties who have been joined as parties defendant via service of process. Michetti disagrees, claiming that Congress' use of the term "defendant" in § 1441(b) is not indicative of the meaning of that term in § 1446(b).[10] Michetti claims that to substitute the § 1441(b) definition of "defendants" (parties in interest who have been properly joined and served) into §1446(b) renders the statute nonsensical. To the contrary, though the substituted language makes the wording of the statute somewhat cumbersome, the meaning is infinitely clear — a named party need not remove until thirty days after he has been properly joined and served as a defendant *and* has received a copy of the complaint. Moreover, the fact that the definition of a word used in a statute cannot be substituted into the statute itself without rendering the wording of the statute awkward attests only to the drafter's wisdom in using the word rather than its lengthier definition.

Michetti addresses the requirement of complete diversity between all named plaintiffs and named defendants for purposes of diversity jurisdiction. The significance of this discussion is unclear, but Michetti seems to suggest that the complete diversity requirement of diversity jurisdiction necessarily dictates

[10] Michetti suggests that because Congress included "proper joinder and service to modify 'defendant' in § 1441(b) but excluded those same modifiers in § 1446(b)," Congress intended that the meaning of "defendant" in § 1446(b) be broader than in § 1441(b). Michetti's argument is misdirected, however, because the phrase "properly joined and served" does not modify "defendant" in § 1441(b). The phrase "properly joined and served as defendants" modifies "parties in interest."

that the term "defendant" in § 1446(b) includes all parties named as defendants. Such a position might have some logical basis if the diversity statute used the term "defendant" in defining diversity jurisdiction, but it does not. Rather, the statute defines diversity jurisdiction in terms of a controversy between citizens of different states. See 28 U.S.C. § 1332. Whether unserved defendants must be considered in determining the procedural limitations on removal is an issue separate and distinct from the scope of diversity jurisdiction.

Michetti also seems to suggest that the language of § 1441(b) should be disregarded because it has no practical realm of operation within the limitations of diversity jurisdiction. Michetti argues that *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), stands for the proposition that "diversity of citizenship does not exist where a resident co-defendant is named in the complaint" and that the provisions of § 1441(b) do "not alter the more general requirement of complete diversity imposed by § 1441(a)" and original diversity jurisdiction. (Brief for Respondent, p. 14). Michetti concludes that "[t]his holds true even where the resident defendant is unserved at the time of removal, because diversity would be lacking despite the flaw in service." (Brief for Respondent, p. 15). Michetti's apparent conclusion that the final sentence of § 1441(b) has no realm of operation is flawed because Michetti's premise is flawed. *Pullman* does not hold that diversity jurisdiction does not exist if a resident defendant is named in the complaint. It holds that when the *plaintiff* is a resident of the forum state, the presence of an unserved resident defendant defeats diversity jurisdiction because complete diversity does not exist. Where the plaintiff is *not* a resident of the forum state, the presence of a resident defendant does not defeat diversity jurisdiction, though it is a *procedural* bar to removal if that resident defendant has been "properly joined and served as a defendant." Plainly, the last sentence of § 1441(b) has a realm of operation separate and apart from the jurisdictional limitations on diversity jurisdiction.

Contrary to Michetti's position, Congress' use of the term "defendants" in the narrow sense of "parties in interest properly joined and served" certainly is significant in determining the intended meaning of "defendant" in § 1446(b). *C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996)(the same words in different parts of the same act are intended to have the same meaning). At the very least, it highlights an ambiguity in the removal statutes. More probably, it defines the intended scope of the term "defendant" in § 1446(b).

The conflict that the receipt rule creates between § 1446(b) and Rule 81(c) also demonstrates that the receipt rule is not the proper interpretation of § 1446(b). Michetti does not dispute that the receipt rule interpretation of Rule 81(c) might require a defendant who exercises its removal rights to file a responsive pleading in federal court prior to service of process. (Brief for Respondent, p. 18). However, Michetti contends that this presents no problem because the defendant can file a Rule 12 motion challenging the sufficiency and adequacy of process.[11] Michetti completely misses the point. Requiring that a defendant make any response to a complaint, whether by way of answer or Rule 12 motion, is contrary to the long-accepted precept that a defendant is not required to do anything until he has been brought

---

[11] Michetti claims that there are no due process implications to the receipt rule, claiming that Murphy and the amici confuse service of process with personal jurisdiction. However, service of process is the mechanism by which the court acquires personal jurisdiction over a defendant. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Absent service of process, the court cannot exercise personal jurisdiction consistent with due process. *Omni Capital Int'l v. Ruldolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987)("Before a court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Certainly, there are due process implications if a court may exercise jurisdiction over a defendant prior to service of process by requiring him to respond to a complaint or suffer default. No such concerns arise with respect to the service rule interpretation.

within the jurisdiction of the court via service of process. Certainly, there is no suggestion in the legislative history that the concurrent amendments to § 1446(b) and Rule 81(c) were intended to abrogate this principle. As the Seventh Circuit has noted:

> [N]othing in the statute, the rule or their respective legislative histories ... would justify our concluding that the drafters ... intended to abrogate the necessity for something as fundamental as service of process. It simply is not reasonable for us to conclude that it was intended that such a major exception to the clear mandates of Rules 4 and 12 be undertaken without any express mention of such a consequence. . . . Requiring a responsive pleading before service is effected is at odds with a fundamental principle of federal procedure — that a responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts. ... Only a court that has jurisdiction over the defendant may require that the defendant state its substantive position in the litigation.

Silva v. City of Madison, 69 F.3d 1368, 1376 (CA7, 1995), *cert. denied*, 517 U.S. 1121 (1996) (citations and footnotes omitted).

Rule 81(c) clearly was not intended to dispense with the requirement of service of process, so the receipt rule cannot be the proper interpretation of Rule 81(c). Because the relevant language was added to the statute and the rule contemporaneously to make the two consistent, logic dictates that the language must be interpreted the same. Consequently, the receipt rule cannot be the proper interpretation of § 1446(b) either.

IV. The service rule interpretation of § 1446 is consistent with the language of the removal statute and the purpose and intent of Congress; it avoids conflicts with other removal statutes and the Federal Rules of Civil Procedure; and it comports with notions of fairness upon which the right of removal is grounded.

All relevant factors indicate that the service rule is the proper interpretation of § 1446(b). The language of the section, when considered in the context of the other removal statutes, indicates that service of process is a necessary prerequisite to the commencement of the removal period. Moreover, this interpretation is most consistent with the history of the statute and with the purpose for which the statute was amended. The service rule promotes consistency and avoids friction with other statutes and comports with notions of fundamental fairness upon which the removal statutes are based. The service rule is also the interpretation that is clearest and most easily understood and applied.

CONCLUSION

For the reasons stated herein and in Petitioner's principal brief, Petitioner requests that the Court reverse the decision of the court of appeals and that the case be remanded for further proceedings in the district court.

Respectfully submitted,

DEBORAH ALLEY SMITH
Counsel of Record
RHONDA PITTS CHAMBERS
RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141
Attorneys for Petitioner

No. 97-1909

In the Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC., PETITIONER

v.

MICHETTI PIPE STRINGING, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether there has been "receipt by the defendant" of a copy of a complaint—and the 30-day time limit for removal of the action has therefore commenced under 28 U.S.C. 1446(b)—when proper service has not been made on the persons authorized by law to receive service of process for the defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1909

MURPHY BROS., INC., PETITIONER

v.

MICHETTI PIPE STRINGING, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether there has been "receipt by the defendant" of a copy of the complaint—and the 30-day time limit for removal of the action has therefore commenced under 28 U.S.C. 1446(b)—when proper service has not been made on the persons authorized by law to receive service of process for the defendant. The United States operates on a scale far greater, and with an organizational structure far more complex, than any ordinary corporate litigant. The United States and its agencies and officers are, moreover, frequently named as defendants in lawsuits filed in state courts throughout the country. The proper interpretation of the removal provision in

28 U.S.C. 1446(b) therefore has a significant impact on the litigation of the United States. In particular, the "receipt" rule adopted by the court of appeals in this case—which eliminates any requirement of proper service before the time for removal commences to run—threatens to foreclose the statutory right of the United States to remove cases to federal court even before those cases have been validly commenced against it in state court.

STATEMENT

1. On January 26, 1996, respondent Michetti Pipe Stringing, Inc., filed a complaint in Alabama state court seeking damages for an alleged breach of contract and fraud by petitioner Murphy Bros., Inc. Without making service as required by local law, respondent faxed a "courtesy copy" of the file-stamped complaint to a vice president of petitioner (Pet. App. A2; Pet. 2). A cover letter advised petitioner that respondent desired to continue settlement discussions so that the matter could be resolved "without continuing the litigation" (Pet. 2). Settlement discussions thereafter continued until February 12, 1996, when service of process was perfected under local law by certified mail (Pet. 2).

On March 13, 1996, petitioner removed this case to federal district court under 28 U.S.C. 1441. Respondent asserted that the removal petition was untimely under 28 U.S.C. 1446(b) because it was not filed within 30 days of the date on which petitioner's vice president received a faxed copy of the complaint. The district court concluded, however, that the 30-day period for removal under 28 U.S.C. 1446(b) did not begin to run until the date that petitioner received lawful service of the complaint (Pet. App. A10). Noting that the statute provides for removal within 30 days of the date that the

defendant receives the complaint "by service or otherwise," the court held that the "or otherwise" language refers to the particular practice of the few States in which an action may be begun by service of a summons *without* the requirement of any initial pleading or complaint. The court concluded that the "or otherwise" language has no application to state court practice in Alabama, where an action is commenced with the filing of a complaint and with the service of the summons and complaint upon the defendant (*ibid.*).

2. On a certified interlocutory appeal, the court of appeals reversed (Pet. App. A1-A6). The court held that, even in the absence of lawful service of process, "the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading" (*id.* at A1). The court reasoned that the plain meaning of the phrase "'through service *or otherwise*' opens a universe of means besides service for putting the defendant in possession of the complaint" (*id.* at A3) (emphasis added).

The court of appeals rejected the argument that "this plain meaning contravenes the congressional intent reflected in the legislative history" (Pet. App. A4). The court acknowledged that the "or otherwise" language had been added to the removal statute in 1949 to address the problem of States such as New York, "where service of process could precede filing and service of the complaint" (*ibid.*). The court reasoned that affording the language of the statute its plain meaning did not conflict with this legislative purpose, for there was nothing to indicate that Congress intended to limit application of the amendment "to New York and like states" (*id.* at A5). The court stated that "[t]he indication is in fact to the contrary," because it appears that

Congress sought to place defendants in all States on the same footing (*ibid.*).

With respect to the possibility that "a receipt rule invites abuse" by counsel who would "set 'courtesy copy traps' for unwary defendants," the court stated that "[t]he short answer is that no such abuse has occurred here" (Pet. App. A6). The court stated that "[t]he question of discouraging unjust tactics can thus be safely set 'aside for consideration on a rainy day'" (*ibid.*, quoting *Roe* v. *O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The 30-day period for removal of cases to federal court under 28 U.S.C. 1446(b) commences only after the "defendant" has received a copy of the complaint. A party is made a "defendant" to a lawsuit only through lawful service, not by sending a copy of a complaint through a fax machine or by some other unauthorized means. Neither the text nor the history of the removal statute supports the conclusion reached by the court of appeals in this case that Congress intended, in the 1949 amendment to 28 U.S.C. 1446(b), to require a party to remove a case even though lawful service of process has not been made.

Prior to enactment of the 1949 amendment, the statutory removal period expressly began to run on the date that service of process occurred. That pre-1949 provision created a problem under the laws of a few States that permitted a civil action to be commenced by service of a summons *without* an accompanying complaint. The 1949 amendment was expressly designed by Congress to resolve the problem that existed for the defendants in those States by specifying that the removal period would commence only after the complaint was

"recei[ved] by the defendant, through service or otherwise." 28 U.S.C. 1446(b). Nothing in the legislative history or in the text of the amendment suggests an intent to eliminate the universal requirement that the "defendant" first be brought into the case through compliance with applicable rules for valid service of process.

The language that Congress chose in 1949 to address the specific problem of separate delivery of the complaint and the summons under New York practice does not support an interpretation that would transform that amendment into an obstacle to the proper conduct of litigation by the United States. Congress has provided the United States with a broad right of removal for cases filed against it in state court. 28 U.S.C. 1442 (1994 & Supp. II 1996). Under the interpretation of 28 U.S.C. 1446(b) adopted by the court of appeals in this case, that broad right of removal could be defeated through the simple artifice of sending a "fax" or other unofficial copy of the complaint to any of a wide variety of federal officials, even though those officials are not authorized to receive service on behalf of the United States. In enacting the 1949 amendment, Congress did not intend to authorize that facile nullification of the removal right conferred on the United States.

ARGUMENT

I. THE INTERESTS OF THE UNITED STATES WOULD BE IMPAIRED BY AN INTERPRETATION OF 28 U.S.C. 1446(b) THAT DISPENSES WITH VALID SERVICE OF PROCESS AS A CONDITION OF COMMENCING THE TIME ALLOWED FOR REMOVAL

The interpretation of 28 U.S.C. 1446(b) adopted by the court of appeals threatens severe prejudice to the right of the United States to remove cases commenced against it in state courts. The United States is entitled to remove to federal district court any proceeding brought in state court against the United States or against "any agency thereof or any officer of the United States" who is sued "for any act under color of such office." 28 U.S.C. 1442(a)(1) (Supp. II 1996). See also 28 U.S.C. 1442(a)(3) (removal of suits against federal judicial officials); 28 U.S.C. 1442(a)(4) (removal of suits against federal legislative officials); 28 U.S.C. 1442a (removal of suits against members of armed forces); 28 U.S.C. 1444 (removal of foreclosure actions against the United States). It is not unusual for a relatively low-level federal official in a local field office to receive a copy of a pleading naming the United States as a defendant. This can occur for a variety of reasons: through a defective attempt by an unsophisticated litigant to make service on the United States; as a "courtesy" or "advance" copy of an unserved pleading; and even, perhaps, as a premeditated litigation tactic seeking to extinguish the removal right of the United States even *before* the case is validly commenced in state court by lawful service of process.

Due to the size and scope of the government's activities, this problem is greater for the United States than

it is for other litigants. Many federal officials, in all ranks of government, would be unlikely to attach any substantive significance to their receipt of a faxed or non-official copy of a state court pleading. Under the "receipt" rule articulated by the court of appeals, however, the statutory right of the United States to remove cases filed against it in state court could often expire long before the persons who have authority to act on behalf of the government are even made aware of the existence of the lawsuit. In establishing the procedure for the removal of cases under 28 U.S.C. 1446 (1994 & Supp. II 1996), it is exceedingly unlikely that Congress intended to allow such a simple nullification of the broad and comprehensive removal right that it conferred in related statutory provisions.

This conclusion draws additional support from the policies reflected in Rule 4(i) of the Federal Rules of Civil Procedure. That Rule, which sets forth prerequisites for service of process "[u]pon the United States, and Its Agencies, Corporations, or Officers," employs a "belt and suspenders" scheme of service to ensure that the proper decisionmaking officials of the federal government receive notice of any lawsuit in time to take appropriate action. Under the detailed guidelines of the Rule—which have been in place since the inception of the Federal Rules of Civil Procedure in 1938—the plaintiff must serve not only "the United States Attorney for the district in which the action is brought" (Fed. R. Civ. P. 4(i)(1)(A)) but must also serve the Attorney General (Fed. R. Civ. P. (4)(i)(1)(B)) and, when the validity of an order of a non-party officer or agency is involved, must also serve that officer or agency as well (Fed. R. Civ. P.(4)(i)(1)(C)). The policies reflected in this Federal Rule, and in analogous state rules governing the service of process, would be

seriously undermined by a construction of the removal statute that deprived the appropriate decisionmakers of a realistic opportunity to address the matter of removal.[1]

The courts that have adopted a "receipt" rule under 28 U.S.C. 1446(b) have not squarely confronted the question of *whose* receipt is sufficient to commence the running of the statute. In adopting the "receipt" rule in *Tech Hills II Associates* v. *Phoenix Mutual Insurance Co.*, 5 F.3d 963 (6th Cir. 1993), the court stated that,

[1] Only a few courts have addressed whether state service procedures are supplanted in cases against the United States by Rule 4(i) of the Federal Rules of Civil Procedure. For example, in *Wilson* v. *United States Department of Agriculture*, 584 F.2d 137, 140-141 (1978), the Sixth Circuit held that state rules of civil procedure control service for federal agencies in state court proceedings unless federal law expressly otherwise provides. State service rules, however, ordinarily result in sufficient service on the United States. The States sometimes choose to incorporate the federal standard of Rule 4(i) for service on the United States. See, *e.g.*, Md. R. Civ. P. 2-124(k) ; D.C. Super. Ct. R. 4(2)(c)(i). Other States require all suits against the state government to be served on the state attorney general (see, *e.g.*, Cal. Gov't Code § 955.4 (West 1995); Ky. R. Civ. P. 4.04(6); Mass. R. Civ. P. 4(d)(3); N.J. R. Ct. 4:4-4(a)(7); Ohio R. Civ. P. 42(10), Tex. Civ. Prac. & Rem. Code Ann. § 30.004 (West 1998); Wyo. R. Civ. P. 4(5); in cases involving the federal government in these States, the state courts ordinarily apply either the rule for service applicable to the state government or the requirements of Rule 4(i) itself. See *Lamb* v. *Village of Quincy*, 636 N.E. 2d 412, 417 (Ohio Ct. App. 1993), (requiring notice to "HCFA, the Secretary of HHS, or the United States Attorney General and the United States attorney"), cert. denied, 513 U.S. 930 (1994). Federal agencies that are authorized to sue and be sued in state courts have been empowered to specify by regulation that service on them be made under Rule 4(i). See *A.L.T. Corp.* v. *Small Business Admin.*, 801 F.2d 1451, 1457-1458 (5th Cir. 1986).

"[a]s a general rule, a complaint is considered received by a corporation when it is received by an agent authorized to accept service of process." *Id.* at 968 (citing *Pochiro* v. *Prudential Ins. Co.*, 827 F.2d 1246, 1279 (9th Cir. 1987)); 14A C. Wright, et al., *Federal Practice and Procedure* § 3732, at 284-285 (1997 Supp.). Without deciding whether there are any exceptions to this general rule, the court held that "delivery at defendant's place of business on a Saturday, when the offices are closed, to a security guard, who is not authorized to receive service on behalf of the corporation" would *not* be "receipt under the removal statute." 5 F.3d at 968. The court concluded in that case that the removal period was commenced, however, when the security guard transmitted the pleading to "an authorized representative" of the defendant on the following Monday. *Ibid.*

In *Reece* v. *Walmart Stores, Inc.*, 98 F.3d 839, 843 (5th Cir. 1996), the court expressly held that the removal period was triggered by receipt of a copy of the complaint by the CEO of a corporation even though the CEO was *not* authorized to accept service of process for the corporation. The court agreed "that a corporation is not deemed to have received a petition just because any one of its employees has received it." *Ibid.* The court reasoned, however, that the CEO was "a person whom [the plaintiff] reasonably could assume to be responsible and sufficiently familiar with legal matters to forward the pleading to the proper individual or department within the company." *Ibid.* The court concluded that "this method of delivery" was "a perfectly sensible way to notify a responsible individual within the corporation." *Id.* at 843-844.

It is thus unclear whether the courts that apply a "receipt" rule under this statute would regard delivery

to any of the thousands of various federal officials located at any of the hundreds of federal offices and agencies throughout the Nation as sufficient to constitute "receipt" by the United States. The broad standard suggested in *Reece* v. *Walmart*, 98 F.3d at 843, would seemingly require only that it "reasonably" appear to the *plaintiff* that the federal officer could be expected to "forward the pleading to the proper individual." A standard of such ambiguity and breadth could significantly prejudice the government's statutory right of removal. Indeed, any standard that fell short of requiring service on the individuals authorized by law to receive service of process would fail to ensure that the pleading is received by "the proper individual" who is responsible for protecting the rights of the United States.

If the "receipt" rule articulated by the court of appeals were the only reasonable interpretation of 28 U.S.C. 1446(b), any remedy for the difficulties thus created would necessarily lie with Congress. As we discuss below, however, neither the text nor the history of the statute supports the reasoning or conclusion of the court in this case.

II. THE LANGUAGE AND LEGISLATIVE HISTORY OF 28 U.S.C. 1446(b) REFLECT THAT VALID SERVICE OF PROCESS IS REQUIRED TO COMMENCE THE RUNNING OF THE TIME ALLOWED FOR REMOVAL

In 1949, Congress amended 28 U.S.C. 1446(b) to address a particular anomaly that had arisen under the statute from the variations that existed in the state procedures for commencing litigation. Before the statute was amended in 1949, the time for removal ran simply from the "service of process" on the defendant.

28 U.S.C. 1446(b) (1948). The Committee Note on the 1949 Amendments explained that:

> Subsection (b) of section 1446 of Title 28, U.S.C., as revised, has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.
>
> The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.
>
> This provision, however, without more, would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

16 *Moore's Federal Practice* § 107 App.02[2] (D. Coquillette et al. eds., 3d ed. 1998). For these specific reasons, Congress amended the statute to provide that the time for removal is to run from the "receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief" (28 U.S.C. 1446(b)). By adding the language "through service or otherwise," Congress sought to *accommodate* the diverse service rules of the various States. The amendment was not designed, and did not purport, to

eliminate the requirement that the service rules of the individual States be complied with as a prerequisite for commencing the time for removal. In particular, the amendment was not designed to create a trap for the unwary that would permit a defendant to lose the right of removal even before the action is validly commenced by service of process on the defendant in accordance with state procedures.[2]

The text of the statute makes this clear, for it applies only when "the defendant" receives the initial pleading. 28 U.S.C. 1446(b).[3] For the purposes of this statute, a party cannot be deemed "the defendant" in a case filed in state court until that case has been lawfully commenced either (i) by service, under the ordinary rule, of the summons and complaint or (ii) by service, under the New York and Kentucky rules, of the summons without the complaint. See Committee Note on the 1949 Amendments, *supra*; note 3, *supra*.

A related provision of the removal statutes confirms this understanding. In cases in which diversity is the grounds for removal, 28 U.S.C. 1441(b) provides that the "action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the State in which such action is brought" (emphasis added).[4] Congress plainly understood that a "defendant" must be "properly joined and served" in the case for removal to occur.

---

[2] In *Roe* v. *O'Donohue*, 38 F.3d at 303, the court noted that the "cases that would put this language under stress (and hold it up to a charge of absurdity) are not hard to imagine: consider, for example, what happens if the plaintiff sends the defendant a courtesy copy of the complaint before filing, and thus before removal is possible." *Ibid.* In the present case, the court of appeals stated that this particular misapplication of the statute could not occur because, "until it is filed, a draft complaint is not the 'initial pleading setting forth the claim for relief upon which such action . . . is based' that the defendant must receive to start the thirty-day clock" (Pet. App. A6). Of course, it is not possible for a defendant to be certain, in the absence of file-stamping or an attached summons, whether or not a copy of a complaint received (for example) by fax has been filed. It is thus plainly possible, under the decision of the court of appeals, for defendants to lose their removal rights before they even become aware that the lawsuit has been commenced.

[3] A different rule applies for the States described in the 1949 legislative history, such as Kentucky (see pages 4-5, *supra*), that require the complaint to be filed at the time the summons is issued but do not require the complaint to be served along with the summons on the defendant. In those States, the 1949 amendment provides for the time for removal to expire "thirty days after the service of summons upon the defendant" (28 U.S.C. 1446(b)).

[4] As petitioner notes (Pet. 13), Rule 81(c) of the Federal Rules of Civil Procedure, which provides a 20-day time limit within which to respond to a complaint after removal, was adopted contemporaneously with and in response to the 1949 amendment. That Rule contains language identical to the "or otherwise" language in the removal statute. In *Silva* v. *City of Madison*, 69 F.3d 1368 (7th Cir. 1995), cert. denied, 517 U.S. 1121 (1996), the court properly construed this identical language to require service of the complaint as the event that triggers the 20-day period. In so holding, however, the court sought to distinguish its prior decision in *Roe* v. *O'Donohue*, *supra*, in which, without considering the language of Rule 81(c), the court held that Section 1446(b) imposes a "receipt" rule on the removal period. See 69 F.3d at 1376. The court did not adequately explain why one who has not yet lawfully been made a party to an action should be required to decide in which court system the case should be heard. The court stated only that "[i]t is one thing to require removal before proper service is effected; it is quite another to require a party to file a responsive pleading." *Ibid.* We disagree. In both of these contexts, proper notice of the litigation to the persons who are lawfully designated to receive process is equally necessary so that the rights of the defendant may be fully and fairly protected.

It would be anomalous if any of the time limits that govern a defendant's possible responses to the initiation of a lawsuit—such as removal—would begin to run *before* that party actually became a defendant through the lawful commencement of the suit by valid service of process. Lawful service upon the party named as the defendant in the complaint is a prerequisite to the ordinary exercise of judicial authority and to the due process of law. Absent a statutory text and history that clearly compel a different rule in this specific context, it should be assumed that Congress did not intend to alter these established principles in the 1949 amendment of this statute.

Instead, as both the text and history of the 1949 amendment reflect, for the removal time to begin running, the suit must be validly commenced by lawful service of process against the "defendant." To give account to the rules of those States in which an action may be commenced merely by serving the summons and without providing a copy of the complaint, the statute provides that the "defendant" must have received a copy of the complaint *by some means*—whether by "service or otherwise." 28 U.S.C. 1446(b); see also note 3, *supra*. When, under the ordinary state practice, applicable law requires service of *both* the summons *and* the complaint to bring the "defendant" into the case, the 30-day removal period commences to run only upon the perfection of such service.[5]

---

[5] In *Reece* v. *Walmart Stores, Inc.*, 98 F.3d at 841 n.3, the court failed to address the requirement that there be a "defendant" before the time for removal can begin to run. The court reasoned instead that the statutory text reveals that "the time to remove begins upon receipt of a copy of the initial pleading *through any means*" and therefore concluded that the statute "plainly contemplates that the time to remove might begin prior to service." *Ibid.* The court stated that this "plain language of § 1446(b) does not produce thereby an *absurd* result; instead, it reflects a legislative policy judgment that the receipt rule's benefits outweigh its detriments." *Id.* at 842 Nothing in the history of the 1949 amendments, however, provides any basis for attributing any such "policy judgment" to Congress.

In the present case, applicable state law requires service of the summons and complaint to bring the party served within the jurisdiction of the court as a "defendant" (Pet. App. A10, citing Ala. R. Civ. P. 4). Petitioner thus did not become a "defendant" for purposes of 28 U.S.C. 1446(b) until it received lawful service of process. The faxed copy of the complaint did not lawfully bring petitioner into this action as a "defendant" and did not commence the 30-day period under the removal statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys

DECEMBER 1998

No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DAVID C. LEWIS
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Counsel for Amicus Curiae Defense Research Institute

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23pp

QUESTION PRESENTED

Whether the 30-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1909

MURPHY BROTHERS, INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

This Brief in support of the Petitioner is submitted by the Defense Research Institute ("DRI") pursuant to Supreme Court Rule 37.5. DRI is an organization with members throughout the United States numbering in excess of 21,000.[1] It seeks to advance the cause of the civil justice system in America by ensuring that the concerns

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this Brief. No one other than DRI made a monetary contribution to the preparation or submission of this Brief. Additionally, counsel for both parties have given their written consent to the filing of this Amicus Brief by submitting a letter indicating such consent to the Clerk of the Court.

of the defense bar and potential defendants are properly and adequately represented.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation particular to the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

Because the question before this Court concerns the availability of federal court removal to civil defendants and the time for exercising removal rights under 28 U.S.C. § 1446(b), DRI has an important interest in the outcome of this case. Whether the 30-day removal period is to be measured by a defendant's mere receipt of the initial pleading or from the date of service of process, the organizations and lawyers who make up DRI will be profoundly influenced by any decision. Amicus DRI seeks an opinion from this Court interpreting 28 U.S.C. § 1446(b) as triggering the 30-day removal period no sooner than the date of service.

SUMMARY OF ARGUMENT

The receipt rule endorsed by the Eleventh Circuit has broad implications for litigants and their counsel in removal situations. Beginning the 30-day removal period of 28 U.S.C. § 1446(b) whenever a defendant receives, from any source whatsoever, a copy of the initial pleading, encourages a practice fraught with legal, ethical and practical problems. By triggering legal obligations on such informal receipt rather than formal service, the receipt rule has the real and substantal potential of discouraging pre-suit settlement negotiations, penalizing the conciliatory defendant, and rewarding the cunning claimant.

Adherence to the receipt rule also threatens principles of fundamental fairness and notice in judicial proceedings. Obligating a civil defendant to appear in a proceeding to invoke his removal rights—before even an attempt at services of process—strikes Amicus DRI as fundamentally unfair. A party over whom the court has not acquired personal jurisdiction should not be subject to procedural penalties, such as the forfeiture of valuable removal rights. Beyond encouraging forum-shopping, the receipt rule also enables a plaintiff to block his opponent's potenital exercise of removal rights by allowing him to convey misleading notice. Amicus believes Congress never intended such legal maneuvering when it amended the removal statute in 1949 and DRI urges this Court to interpret the statute consistent with its legislative history and purpose.

ARGUMENT

I. THE INFORMAL NATURE OF THE "RECEIPT RULE" CREATES LEGAL AND PRACTICAL PROBLEMS FOR LITIGANTS.

Removing a case to federal court must be done quickly —within 30 days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ." The interpretation of 28 U.S.C. § 1446(b) adopted by the Eleventh Circuit means that the 30-day removal period is triggered whenever a defendant comes into possession of the initial pleading from any source, regardless of whether it is acquired through formal service of process, informal conveyance from the plaintiff or his lawyer, or through discovery initiated by the defendant himself. Beginning the 30-day removal period with such an informal "receipt rule" is like starting a 100-yard dash using a silencer rather than a starter's pistol—the runners know *where* they should race but are uncertain *when* the race begins.

A. The Receipt Rule Discourages Settlement, Forces Litigation, and Invites Lawyer Gamesmanship.

Counsel for Petitioner and other *Amici* have ably demonstrated the fallacy of the receipt rule through statutory

construction and an examination of the legislative history surrounding 28 U.S.C. § 1446(b). Whether the language or history of the statute could support the Eleventh Circuit's interpretation of 28 U.S.C. § 1446(b), it certainly creates all the wrong incentives. By forcing defendants to appear to protect removal rights before they have been served with process, the receipt rule deters pre-suit settlement possibilities and rewards shrewd trial lawyers who are able to lull their opponents into a false sense of security by presenting them (yet not serving them) with "courtesy copies" of the complaint.

Public policy has always favored settlement over litigation as a means of resolving disputes. *Marek v. Chesny*, 473 U.S. 1 (1985); *Maher v. Gagne*, 448 U.S. 122 (1980); and *Williams v. First National Bank*, 216 U.S. 582 (1910). Once a lawsuit is filed and defendants are forced to appear, they assume the role of litigation adversaries and attempts at conciliation are more often than not futile.

While there may exist sound reasons for forcing a defendant to invoke the right to remove quickly, DRI believes the 30-day removal period of 28 U.S.C. § 1446(b) should not be interpreted to begin any sooner than the date on which formal service of process is at least attempted on the defendant. Starting the 30-day clock any sooner forces an adversarial relationship upon the parties that is neither favored by public policy nor intended by the Congress that adopted the 1949 amendments to 28 U.S.C. § 1446(b).

Consider the pre-suit dilemma faced by the governmental defendant. The vast majority of states have enacted laws requiring a notice of claim to precede the filing of an action to enable state and local governments to assess their potential for liability and settle meritorious claims short of litigation. *Felder v. Casey*, 487 U.S. 131 (1988). A local governmental entity may seek to negotiate a pre-suit settlement with the claimant whose attorney

may also provide government counsel with a courtesy copy of the complaint recently filed in state court. Suppose the courtesy complaint includes a variety of state law tort claims as well as civil rights claims under 42 U.S.C. § 1983, providing a basis for federal-question jurisdiction under 28 U.S.C. § 1331 and, hence, removal to federal court under 28 U.S.C. § 1441(b). While the parties may be on the verge of settlement, the receipt rule compels the government attorney desiring removal to act immediately by appearing in the case and thereby forces an adversarial relationship upon the parties that does nothing but harm the very settlement prospects the "courtesy copy" was supposed to foster.

Perhaps the greatest irony in the receipt rule is its ability to promote one-sided forum-shopping. The word "remove" means, quite literally, "to move back." *Webster's II New Riverside University Dictionary* at 995 (1994). Removal enables a defendant to correct a defect in the plaintiff's choice of forum by transferring the case to the federal forum—where it belonged in the first instance under either diversity or federal question jurisdiction. While Congress was certainly entitled to impose a short 30-day period in which removal rights must be exercised by defendants, Congress could not have intended the mischief the receipt rule invites by allowing a plaintiff to initially file suit in the forum of his choice and then supply misleading notice of the action in order to defeat his opponent's exercise of removal rights. *See Wecker v. Nat'l Enameling & Stamping Co.*, 240 U.S. 176, 186 (1907) ("[T]he Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts in proper cases to retain their own jurisdiction.").

Interpreting the 30-day removal period of 28 U.S.C. § 1446(b) to begin upon service rather than receipt of

the complaint is not only supported by clear congressional intent from the 1949 amendment, such an interpretation would curtail the type of gamesmanship reflected in the published case law. *See generally Conticommodity Services, Inc. v. Perl,* 663 F.Supp. 27 (N.D. Ill. 1987) (defendant's discovery of complaint and summons under his apartment door when he returned home began the running of 30-day removal countdown); *Brown v. Mayflower Transit, Inc.,* 960 F.Supp. 212 (W.D. Mo. 1997) (receipt of fax copy of courtesy complaint by defendant's attorney started removal period); *Pillin's Place, Inc. v. Bank One, Akron, NA,* 771 F.Supp. 205 (N.D. Ohio 1991) (facsimile transmission of courtesy copy of complaint triggered 30-day removal and there was nothing in the record indicating that plaintiffs were attempting to "reap the benefits of gamesmanship."); *Love v. State Farm Mutual Automobile Insurance Co.,* 542 F.Supp. 65 (N.D. Ga. 1982) (removal period did not begin until formal service of process even though plaintiff had filed complaint and mailed unconformed copy to defendant with a letter saying he had directed marshall not to serve process and that he hoped to settle the matter without litigation); and *Silverwood Estates Dev. Limited Partnership v. Adcock,* 793 F.Supp. 226 (N.D. Ca. 1991) (courtesy copy of complaint sent to defendant to review after he had requested a draft; 30-day countdown began upon receipt of courtesy copy). *See also* R. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court,* 52 Md. L. Rev. 374 (Winter 1993).

B. The Receipt Rule Encourages Lawyers and Their Clients To Remain in the Dark in the Information Age.

Because the 30-day period for removal under the receipt rule is triggered any time a defendant comes into possession of a copy of the complaint from any source, it is immaterial whether the copy is sent by plaintiff's counsel or is discovered by the defendant himself. Measuring the 30-day period from receipt rather than service, therefore, requires defendants to adhere to an honor system which may have the unintended effect of encouraging defendants and their lawyers to remain uninformed.

The case before this Court involves the transmission of a facsimile copy sent to a defendant knowledgeable about litigation strategy—the vice president/risk manager for Petitioner Murphy Brothers, Inc. Because the receipt of a facsimile transmission is but one of numerous ways in which a defendant may come into possession of a copy of the initial pleading, this Court should also consider the broader implications of the receipt rule in the information age courts are entering with increasing frequency. Some state court systems, for instance, have already established websites on the Internet to enable the public to track and discover court dockets on a daily basis. A defendant or his attorney may be aware of an adverse incident and may be attempting to settle it short of litigation. Performing a simple word search on the local state court's website may disclose that the action the defendant is attempting to settle has already been filed. The same is true of certain high-profile cases reported by the media—lawsuits about which defendants and their attorneys may know nothing until reading about the filing in the newspaper or discussing the matter with a reporter.

Should the defendant or his attorney obtain a copy of the complaint from the courthouse? Those who regard knowledge as power will likely obtain a copy of the complaint, regardless of the consequences. The Eleventh Circuit's receipt rule, however, has the effect of burdening that knowledge by discouraging parties from discovering the contents of lawsuits filed against them, denying or disputing the date on which such knowledge was acquired, or forcing them to exercise removal rights during a conciliatory period of settlement negotiations.

The dispute among lower courts has only added to the uncertainty civil defendants face when receiving copies of lawsuits containing the basis for removal to federal court. *See* D. Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992). Adoption of a receipt rule, however, presents more problems than it solves. Unlike a well developed body of law establishing service dates with a reasonable degree of certainty, the date on which a copy of an initial pleading is informally received by a defendant will likely be the subject of intense dispute. Questions concerning agency, the actual receipt date, and whether the form of document received qualifies as an "initial pleading" are likely to generate continuing interpretation problems for lower courts.[2] Fixing a statutory accrual date on such an informal event—with no judicial mechanism in place to monitor its occurrence—is contrary to the history and purpose of the removal statute and does little to promote candor and fair play among the parties.

---

[2] The lack of clarity in the removal statute and the informal nature of the receipt rule has prompted some attorneys to contend that a defendant's receipt of an *unfiled* complaint triggers the 30-day period. *See Arnold v. Federal Land Bank of Jackson*, 747 F. Supp. 342 (M.D. La. 1990) (30-day period did not begin to run on defendant's receipt of courtesy copy of petition that had not even been filed with state court); and *Campbell v. Associated Press*, 223 F. Supp. 151 (D.C. Pa. 1963) (draft of complaint submitted to defendant in furtherance of settlement with agreement to defer filing and which was never filed and form submitted was not a copy of "initial pleading," the receipt of which would commence removal period). A complaint that was filed but not signed was held sufficient to trigger the 30-day period because the local signature requirement was deemed to be a technical, rather than jurisdictional, defect. *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 843 (5th Cir. 1996).

II. A DEFENDANT OVER WHOM JURISDICTION HAS YET TO BE SECURED SHOULD NOT BE FORCED TO APPEAR AS A PARTY TO PROTECT HIS REMOVAL RIGHTS.

Amicus accepts without argument Congress' authority to prescribe the method by which removal jurisdiction is invoked, the time perod in which it must be exercised, and the consequences of an untimely removal request. *See City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966); and *Martin v. Hunter's Lessee*, 1 Wheat. 304, 349, 4 L.Ed. 97 (1816) ("The time, the process, and the manner [of removal] must be subject to [Congress'] absolute legislative control."). DRI does question, however, the constitutional auhority of Congress to insist that a defendant—over whom jurisdiction has yet to be acquired through even attempted service—must act immediately to invoke his removal rights under federal law. The Eleventh Circuit's interpretation of 28 U.S.C. § 1446(b) has the unfortunate (and perhaps unconstitutional) consequence of elevating the need for speed in invoking a federal court's derivative jurisdiction under Article III over personal jurisdiction and its emphasis on notice and fairness under the Due Process Clause.

In a series of cases dating back to the earlier part of this century, the Court emphasized that an improperly served defendant retains the ability to raise jurisdictional objections after removal to federal court is effected. *See generally Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377 (1922) ("If a state court lacks jurisdiction over the subject or over the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."); *General Inv. Co. v. Lakeshore & N.S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("Where a cause is removed from a state court into a federal court, the latter takes it as it stood in the former. A want of jurisdicion in the state court is not cured by the removal, but may be asserted after it is consummated."); *Mechanical Appliance Co. v. Castleman*, 215

U.S. 437 (1910) (no jurisdiction over defendant improperly served despite removal to federal court); and *Wabash Western R. Co. v. Brow,* 164 U.S. 271 (1896) (personal jurisdiction objections not waived by removal to federal court). When interpreting the removal statute in existence at the time, this Court's *Wabash* opinion further noted that "the only reasonable inference is that Congress contemplated that the petition for removal should be filed in state court *as soon as the defendant was required to make any defence whatever in that court,* so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in [the federal court]." *Id.* at 277-78 (emphasis added.) *See also Arizona v. Manypenny,* 451 U.S. 232, 242 n. 17 (1981) ("In the area of general civil removals, it is well settled that if the state court lacks jurisdiciton over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there.").

These cases give assurance to the civil defendant that his exercise of removal rights will not operate to forfeit any challenges to the sufficiency of process he may seek to assert in federal court after removal. But can a defendant constitutionally forfeit removal rights in the complete absence of any attempt to serve him with process? While most of these cases developed during a time when courts adhered to the outdated distinction between general and special appearances, an "appearance" remains the term used to describe a defendant's method of entering an action to assert defenses and objections to the proceeding, DRI doubts there exists any constitutional authority for compelling a civil defendant to enter an appearance in an action (by noticing its removal to federal court) when there has been no attempt to serve process on that defendant or acquire jurisdiction over him. *Compare Omni Capital Int'l. Ltd. v. Rudolf Wolff & Co., Ltd.,* 44 U.S. 97, 104 (1987) ("Before a court may exercise personal jurisdiction over defendant, the procedural requirement of

service of summons must be satisfied."). The filing of a notice of removal effectively replaces the state court with a federal forum and is no different functionally from the type of subject matter jurisdiction and venue objections recognized under Rule 12(b)(1) and (3), Federal Rules of Civil Procedure. Forcing a court appearance on an unserved defendant and attaching penalties to his non-appearance—through the forfeiture of removal rights—is fundamentally unfair.

A basic requirement of due process is the opportunity to be heard "in a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Due process requires, at a minimum, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 550. In a case where notice was found lacking by attempting service through publication in a local newspaper, this Court emphasized that the "notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citations omitted).

To the extent 28 U.S.C. § 1446(b) can be interpreted to support a "receipt rule" in which a defendant must exercise removal rights after acquiring knowledge of a lawuit's contents but before attempted service of process, such an interpretation implicates serious Due Process concerns. The problem is not that a defendant is without any notice; the defect lies in the *misleading* type of notice given. Either through self-discovery, the feigned kindness of opposing counsel, or other means, a defendant comes into possession of a copy of the initial pleading. He is not informed, however, that he must answer the lawsuit or file a responsive pleading within a specific time period to avoid default. He is told nothing about the potential

consequences of inaction and therefore does not believe any exist. The Eleventh Circut's receipt rule unfortunately endorses a practice by which such misleading notice is sufficient to trigger a defendant's duty to act and, in the absence of noticing the removal within 30 days, all removal rights become forfeited.[3]

Adopting the service rule is the only way to reconcile the language and history of the removal staute with the constitutional limitations on Congress' authority to prescribe the timing and method by which removal rights are exercised. The service rule ensures that valuable removal rights are not lost unless and until there has been at least some attempt by the plaintiff to subject the defendant to the personal jurisdiction of the court through service of process. The service rule further assures the litigants a measure of formality in the manner in which judicial proceedings are commenced and procedural rights exercised. Because the service rule satisfies notice and fundamental fairness concerns that the receipt rule disregards, DRI urges this Court to hold that the 30-day removal period of 28 U.S.C. § 1446(b) dos not begin to run until a defendant receives a copy of the initial pleading via service of process.

---

[3] The problem is exacerbated by an examination of 28 U.S.C. § 1441(b), which provides that only those parties "who are properly joined and served" as defendants must be considered in determining whether a case is removable. The interplay between Sections 1446(b) and 1441(b) is fully addressed in Petitioner's Brief and Amicus agrees that the receipt rule cannot be reconciled with 28 U.S.C. § 1441(b).

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the decision of the Eleventh Circuit should be reversed, and the 30-day removal period of 28 U.S.C. § 1446(b) interpreted as beginning no sooner than the date of service of process.

Respectfully submitted,

DAVID C. LEWIS
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Counsel for Amicus Curiae
Defense Research Institute

No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191-1517
(703) 264-5300
Of Counsel

PATRICK W. LEE *
ROBERT P. CHARROW
LEAH LORBER
CHRISTOPHER J. MCGUIRE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
* *Counsel of Record for Amicus Curiae Product Liability Advisory Council, Inc.*

December 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 97-1909

MURPHY BROTHERS, INC.,
Petitioner,
v.
MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 123 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to elec-

[1] In accordance with Supreme Court Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other than the *amicus*, have made a monetary contribution to the preparation or submission of this brief. Letters from counsel for Petitioner and Respondent have been filed with the Court Clerk indicating the parties' consent to the filing of an *amicus* brief in this case by the Product Liability Advisory Council, Inc.

tronics to pharmaceutical products. A list of PLAC's current corporate membership is provided in the attached Appendix. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (*i.e.*, non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court.

The effective exercise of the right to remove a case from state to federal court and its impact on federal practice and procedures are of vital concern to American industry. Although it is not an issue that is strictly limited to the area of product liability, it is quite common in those cases. As a significant voice on issues in this area, PLAC submits this *amicus curiae* brief in order to identify for the Court the broader concerns and practical implications involved in making a determination on the issue before it.

SUMMARY OF ARGUMENT

The right of access to the federal courts is embedded in the Constitution. It both provides litigants access to an impartial federal forum and ensures that federal law will be interpreted in a uniform manner. The first Congress created a mechanism for defendants to assert this right by providing for the removal of a civil case from state to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The Court has long protected the right of removal and has cautioned that the Federal courts may, and should, " 'take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.' " *Wecker v. National Enameling and Stamping Co.*, 204 U.S. 176, 182-83 (1907), *quoting Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906).

This right is diminished where procedural requirements encourage abuse of the removal rules by plaintiffs and unnecessarily create practical problems for corporate defendants that preclude adequate notice of when the removal period begins. The receipt rule adopted by the Court of Appeals in this case not only clashes with the ideals of federal jurisdiction, but also raises serious constitutional questions and promotes wasteful litigation over purely procedural nuances.

Amicus submits that the federal removal statute should be read as originally intended so as to ensure that reasonable access to federal fora is available to those defendants who are involved in commercially complex arrangements governed by federal law or in disputes among interstate parties.

ARGUMENT

I. THE REMOVAL STATUTE WAS INTENDED TO IMPLEMENT CONSTITUTIONALLY PROTECTED RIGHTS IN A UNIFORM AND EQUITABLE MANNER.

The right to trial in a federal court is rooted in the Constitution and was viewed by the Founding Fathers as a fundamental feature of the new federalism.[2] In the case of a suit between citizens of different states, diversity jurisdiction assured the defendant of a venue less likely to be subject to provincial pressures and local biases. Diversity fostered the perception of fairness; "federal question" jurisdiction promoted national uniformity and placed the responsibility for resolving inherently federal questions in the hands of those best suited for resolving such questions, namely federal judges.

---

[2] *See* THE FEDERALIST, Nos. 80 and 81 (New American Library ed. 1961) (Hamilton); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 2, 12-15 (1948).

Paradoxically, while both diversity and federal question jurisdictions were interposed to guard against the potential shortcomings of state courts, through the middle of this century access to federal courts was largely a function of state law. The federal removal statute was keyed to state procedures and expressly incorporated local, not national, standards. Moreover, the removal petition itself was filed in state, not federal court. Specifically, under the Judicial Act of 1911, ch. 231, 36 Stat. 1087, 1095, a defendant was required to file a removal petition in state court on or before the date it was required to file its first responsive pleading. See 28 U.S.C. § 72 (1940). In some states, defendants had 10 days in which to file their removal petitions while in other states defendants could wait up to 45 days or more.[3] In short, significant federal rights that should have been uniform were governed by varying state law and assessed, at least initially, by state judges.

To bring uniformity and fairness to what was an otherwise chaotic system of removal, in 1948 Congress enacted a removal statute—the predecessor of the one at issue here. Congress had concluded that the process for gaining access to federal courts should not hinge on where a plaintiff chose to institute suit any more than it should depend on the vicissitudes of state procedure. Congress recognized that since federal court jurisdiction springs from the Constitution and fosters important national goals, removal

---

[3] *See Coco v. Altheimer*, 46 F. Supp. 321, 322 (W.D. La. 1942) (defendant has ten days from service to respond if served in or within ten miles of the location where the court is held; up to fifteen days for defendants served more than ten miles from court's location); *Fail vs. American Fid. & Cas. Co. of Richmond, Va.*, 74 F. Supp. 904, 905 (E.D. S.C. 1947) (defendant must answer within twenty days of service); *Wofford v. Hopkins*, 45 F. Supp. 257, 258 (W.D. Tex. 1942) (defendant must respond within twenty days of service); *Kaull v. Johnson*, 218 N.W. 606, 607 (N.D. 1928) (defendant served within state has thirty days to respond; defendant served out of state has 45 days to respond).

should be a matter within the exclusive domain of the federal government.

The 1948 amendments to the Judicial Code addressed these prudential concerns by permitting removal if the defendant filed a petition in federal court within twenty days "after commencement of the action or service of process, whichever is later." In short, under the original statute of 1948, the period for removal would not begin before a defendant received service of process.

Unfortunately, the statute failed to fully achieve both uniformity and equality. The law's language proved to be too inflexible to accommodate the significant variation in state procedures. For example, in New York a plaintiff was not required to file or serve a copy of the complaint: *In personam* jurisdiction attached when the defendant received a copy of the summons alone even though the complaint may never have been filed. Thus, with respect to suits filed in New York state courts, a defendant's right to remove could evaporate before it received a copy of the complaint and before it could determine whether removal was even warranted. To protect the federal rights of those who were subject to procedures such as existed in New York, Congress in 1949 amended the removal statute by providing that a removal petition could be filed within twenty days (now thirty) of the "receipt by the defendant, through service or otherwise, of the initial pleading . . . ." H.R. REP. No. 81-252 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1268. In context, the amendment operated to expand the removal rights of those defendants already subject to a court's jurisdiction.

Ironically, what began as a simple amendment to ensure that defendants in New York state courts were not inadvertently deprived of their right to federal court jurisdiction has devolved, through erroneous appellate court interpretation, into a process under which defendants in all states can inadvertently lose their access to federal

court. What has emerged are two competing schools of thought: (1) the service rule and (2) the receipt rule. The service rule gives effect to the legislative goals of uniformity and fairness by providing that both service of process *and* receipt of the initial pleading are required to trigger the removal period. *See, e.g., Love v. State Farm Mut. Auto Ins. Co.*, 542 F. Supp. 65 (N.D. Ga. 1982). The receipt rule triggers the removal period simply upon receipt of the initial pleading by any means and from any source whatsoever. *See, e.g., Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997); *Tyler v. Prudential Life Ins. Co. of America*, 524 F. Supp. 1211 (W.D. Pa. 1981). By dispensing with the requirement for service of process, the receipt rule creates notice problems, permits rights to be lost before any court's jurisdiction is created, and undermines reasonable corporate practices that ensure responsible decisionmakers receive notice of a lawsuit within a sufficient time to exercise their removal rights.

This Court has been asked to resolve the split among lower federal courts and select the appropriate point at which the removal period begins under 28 U.S.C. § 1446 (b). *Amicus* submits, for the following reasons, that the appropriate trigger is service.

II. THE RECEIPT RULE, WHICH DISREGARDS THE REALITIES OF EXPANSIVE INTERSTATE COMMERCE, CREATES PRACTICAL PROBLEMS AND FOSTERS UNNECESSARY COLLATERAL LITIGATION.

The rules governing the application of the receipt rule are uncertain. These uncertainties prevent corporate defendants from knowing when to act to preserve their rights. Moreover, the receipt rule creates practical problems for corporate defendants (which vary depending on how the rule is applied) and increase the risk that employees responsible for removal decisions will not receive

timely notice that the removal period has started to run. They also promote gamesmanship by plaintiffs' counsel to lure unwary defendants into waiving their removal rights. These practical problems, coupled with the dearth of case law regarding the application of the receipt rule, will lead to numerous collateral disputes that will drain court resources and waste time.

A. The Receipt Rule Creates Practical Problems for Corporate Defendants.

Under the service rule, a known and finite number of corporate employees are eligible to receive service at a known and finite number of locations. Procedures for handling service of process can be taught to those employees. Indeed, the formality of service itself is an important alarm and acts to impress upon the corporate employee the significance of the documents served, and the importance of acting upon the service according to established procedures.

No such significance attaches to a faxed copy of a complaint. Indeed, the ubiquity of fax machines and their routine use belies the significance of the content of what is sent. For a faxed copy of a complaint to be handled expeditiously, someone must know that the *content* of a faxed document is important. Yet the routine nature of facsimile messages, and the volume of faxes received at a corporate office, serve to mask the significance of the actual message. In this context, a copy of a complaint can easily become just another document to be routed in the mail cart—time for delivery unknown. *See Barr v. Zurich Ins. Co.*, 985 F. Supp. 701, 704 (S.D. Tex. 1997) (complaint "received" when signed for by mailroom clerk at agent's office, although complaint was subsequently misfiled at defendant's headquarters); *Spreeman v. Health-South Corp.*, 1996 WL 129814, at *2 (D. Kan. Feb. 27, 1996) (addressee of fax claimed never to have received fax); *Roe v. O'Donohue*, 38 F.3d 298, 303-04 (7th Cir. 1994) (receipt by receptionist triggered removal period

although complaint not forwarded to responsible decision-maker for several days).

Advances in technology and telecommunications will only exacerbate the notice problems inherent in the receipt rule. In jurisdictions where receipt by computer is deemed valid, a complaint sent by electronic mail ("e-mail") to the corporation's general e-mail address could be overlooked in the crush of messages. Internet gateways, which frequently destroy the format of documents, may render the complaint unrecognizable as a legal document. A faxed complaint sent to a corporation's legal department after hours the day before a holiday weekend will likely languish unread for several days. In the meantime, the removal period will start to run, reducing the defendant's time to determine whether the case can and should be removed, to hire local counsel, and to make other arrangements it deems necessary.

Under the receipt rule, corporate defendants will be uncertain as to whether the particular papers they received have triggered the removal period. For example, it is unclear whether receipt of a complaint with missing pages triggers the removal period. Are defendants who receive partial complaints under a duty to affirmatively seek out the missing portions? If so, does the removal period start upon receipt of the partial complaint or upon receipt of the missing pages? This interpretation of the rule is particularly vulnerable to abuse by plaintiffs' counsel, who would shorten defendants' response time by delivering incomplete complaints to their adversaries. Similarly, it is unclear whether a defendant must act immediately to preserve its removal rights when it receives an unsigned, unfiled, or draft complaint. How defective can a "copy" of a complaint be and still trigger the removal period? *See North Jersey Savings & Loan Ass'n v. Fidelity & Deposit Corp. of Maryland*, 125 F.R.D. 96, 100 (D. N.J. 1988) (removal period triggered upon receipt of unfiled complaint accompanied by letter stating complaint is to

be filed); *cf. Schneehagen v. Spangle*, 975 F. Supp. 973, 973-74 (S.D. Tex. 1997) (removal period does not begin until state action is filed). *See also Reece v. Wal-Mart Stores*, 98 F3d 839, 843 (5th Cir. 1996) (period triggered upon receipt of unsigned, file-stamped complaint); *Zatarain v. WDSU-TV*, 1993 WL 98681, at *2 (E.D. La. March 26, 1993) (unpublished) (although pleading was not conformed, defendant was on notice of charges cited therein).

The common practice of providing defendants with a "courtesy copy" of a file-stamped complaint along with a settlement demand also creates practical problems. Courts have found that this triggers the removal period under the receipt rule, even if the plaintiff is attemping to resolve the matter without proceeding with service. In such a case, the defendant risks waiving its right to removal if it relies on the assurances of plaintiff's counsel that the complaint is simply for purposes of settlement discussions. The complications associated with this otherwise laudable practice, one designed to promote settlement, are not fanciful: They occurred in the case *sub judice*, as well as in others. *See Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc.*, 880 F. Supp. 499, 500 (S.D. Tex. 1995) (fact that plaintiff was evaluating settlement proposals and had not been served did not preclude commencement of removal period on receipt of courtesy copy); *Boyles v. Junction City Foundry, Inc.*, 992 F. Supp. 1246, 1249 (D. Kan. 1997) (removal period triggered by receipt of complaint despite plaintiff counsel's assertion service would be withheld pending settlement discussions). *See also Harding v. Allied Prods. Corp.*, 703 F. Supp. 51, 52 (W.D. Tenn. 1989) (branch office employees who received summons and complaint erroneously assumed they were courtesy copies and that original process had been received at corporation's out-of-state headquarters).

Additional practical problems are created when a lawsuit is filed against multiple corporations. Most courts

hold that in suits naming multiple defendants, when the removal period begins to run for one defendant, it begins to run for all defendants. *See Getty Oil Co. of Texas v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a][I] (3d ed.). *But see McKinney v. Board of Trustees of Maryland Comm. College*, 955 F.2d 924, 926-28 (4th Cir. 1992). Notice problems are inherent in application of the receipt rule to multiple-defendant cases; one corporate defendant's removal rights may be triggered by the receipt of a complaint by a clerical employee at another defendant's office. Moreover, the removal rights of all the defendants could turn on the actions of a defendant who is never formally part of the lawsuit. The plaintiff might provide one of several defendants with a courtesy copy of the complaint, fail to serve process on that defendant, and later serve process on the remaining defendants. The removal period would appear to begin to run for all the defendants upon the receipt of the complaint by the unserved defendant, even though the unserved defendant is not required to join in the removal or be considered in determining whether the case is removable. *See* 28 U.S.C. § 1441(b).

The receipt rule also encourages corporations to systematically practice ignorance about their legal affairs. Some companies direct outside counsel to refrain from reporting the existence of new lawsuits, out of concern that the removal period will be triggered prematurely. This discourages pre-suit resolution of disputes and cannot contribute to an efficient legal system.

Adopting the service rule resolves these problems. The service rule ensures that process will be served on a limited number of corporate agents in predetermined locations, and allows corporate defendants to ensure that corporate counsel are immediately notified of the suit. The service rule eliminates the courtesy-copy problem, promotes certainty by identifying a date-certain at which the removal period begins, and allows companies to address their legal affairs in a well-considered manner.

B. The Receipt Rule Encourages Confusion and Unnecessary Collateral Litigation Over the Terms of Its Application.

As might be expected in light of these problems, courts in different jurisdictions following the receipt rule are increasingly being asked to resolve numerous disputes about its application. Selection of the receipt rule in this case will create further unnecessary collateral litigation over whether the defendant "received" a "copy" of an "initial pleading."

The questions requiring resolution in numerous jurisdictions are varied. They include: What is "receipt"?[4] Which employees may "receive" the complaint on behalf of the corporation?[5] Does receipt of the complaint by the corporation's outside counsel or insurance carrier constitute receipt by the corporation?[6] Is receipt by facsimile

---

[4] *See, e.g., Pillin's Place v. Bank One, Akron, N.A.*, 771 F. Supp. 205, 208 (N.D. Ohio 1991) (suggesting need for a case-by-case determination of whether "delivery of the initial pleading is made in a manner which, objectively viewed, is calculated to give fair notice to the defendant").

[5] *See, e.g., Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) ("receipt" exists upon delivery of complaint to agent authorized to accept service of process); *Roe*, 38 F.3d at 303-04 ("receipt" by receptionist triggers removal period); *Reece*, 98 F.3d at 843-44 ("receipt" exists upon delivery of complaint to corporate officer who was not authorized to receive service of process).

[6] *See, e.g., Perkins v. Mari Trend, Inc.*, 1996 WL 277613, at *2 (E.D. La. May 21, 1996) (not reported) (no receipt where courtesy copy was mailed to attorney who previously represented defendant but who was not authorized to accept service for this action); *Joiner v. Kayval Transportation Inc.*, 979 F. Supp. 1252, 1254-55 (W.D. Ark. 1997) (receipt by defendant's attorney sufficient to trigger removal period); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284, 1284-85 (W.D. Mo. 1996) (receipt of courtesy copies by counsel for airline's insurer does not trigger period); *Davis v. Bauer*, 599 F. Supp. 776, 778-79 (E.D. Pa. 1984) (receipt by insurance carrier approved where carrier was authorized to accept service of process).

or e-mail valid? What constitutes receipt by facsimile or e-mail?[7] Does an unconformed copy of a complaint, a draft complaint, or an unfiled complaint constitute an initial pleading?[8]

Because of the unsettled nature of the law governing the application of the receipt rule, plaintiffs and defendants will be unable to determine whether removal is barred until a court considers their case. This lack of predictability will create unnecessary litigation and frustrate the principles of uniformity and fairness inherent in the 1949 amendment. Congress clearly intended the identification of the point at which the removal period begins to run to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty and unproductive and ever-increasing litigation. The "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," which may be properly considered in construing a federal statute, support adoption of the service rule. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (rejecting construction of limitations statute which "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of [42 U.S.C.] § 1983.").

There is no need to drain limited court resources by litigating these and other issues when adoption of the service rule will allow quick resolution of issues through reference to a well-developed body of state service of process

---

[7] *See Bell v. Marmaras Navigation, Ltd.*, 1996 WL 328778, at *1, 3 (E.D. La. June 13, 1996) (unpublished) (addressing the difficulty of proving receipt by fax).

[8] *See Reece*, 98 F.3d at 843 (30-day period triggered upon receipt of unsigned, file-stamped complaint); *Zatarain*, 1993 WL 98681, at *2 (although pleading was not conformed, defendant was on notice of charges cited therein); *Schneehagen*, 975 F. Supp. at 973-74 (removal period not triggered until state court action is filed); *North Jersey Savings & Loan*, 125 F.R.D. at 100 (removal period triggered upon receipt of unfiled complaint accompanied by letter stating complaint is to be filed).

law. *See Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 340 (D. S.C. 1996).

III. NOTICE PROBLEMS INHERENT IN THE RECEIPT RULE UNDERMINE THE POLICIES SUPPORTING FEDERAL JURISDICTION.

The right to federal court jurisdiction, whether based on diversity or federal question grounds, is rooted in the Constitution. Article III, § 2, provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between Citizens of different States . . . and . . . foreign States, Citizens or Subjects.

Defendants' abilities to exercise this right will be hampered or barred by the notice problems created by the receipt rule. Litigants' inability to invoke a federal forum will undermine the purposes for federal jurisdiction—ensuring the well-considered and uniform development of federal law and ensuring litigants an impartial forum.

A. Adoption of the Receipt Rule Undermines the Policy of Uniformity in Federal Law.

At the heart of federal question jurisdiction, and the accompanying right to removal on federal question grounds, is "the importance, and even necessity, of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee* 14 U.S. (1 Wheat) 304, 347-48 (1816) (Story, J.) (emphasis in original); Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

Contrary to congressional intent, applying the receipt rule will lead to greater disparity, not uniformity, in the interpretation and development of federal law. Fewer cases will be removed to federal court, since more defendants will inadvertently waive their removal rights due to notice

problems created by the receipt rule. Instead, state courts will increasingly be called upon to resolve often-complex questions of federal law.

State courts uniformly have less experience resolving federal law issues than do federal courts. "[F]ederal courts are comparatively more skilled at interpreting and applying federal law, and are much more likely correctly to divine Congress' intent in enacting legislation." *Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 827 (1986) (Brennan, J., dissenting). This, along with the sheer number of state courts, suggests that state-court interpretation of federal law will lead to a more chaotic, less precise interpretation of federal law.

As application of the receipt rule undermines the congressional goal of uniformity in the interpretation of federal law, this Court should refuse to adopt it and enforce the service rule.

B. Adoption of the Receipt Rule Undermines Defendants' Access to an Impartial Federal Forum Through Diversity Jurisdiction.

Diversity jurisdiction, which is as old as the Republic, assures an impartial forum in circumstances where the parties' interests or identities might otherwise operate to prevent impartiality. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurances to non-resident litigants of courts free from susceptibility to potential local bias."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.)" An impartial forum was considered to be particularly important for the resolution of commercial disputes between citizens of different states.[9]

[9] *See* Tony Allan Freyer, THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY, 19-30 (JAI Press ed. 1979) (discussing impact of development of federal jurisdiction on problems of commercial litigation in eighteenth and nineteenth centuries); Frank, *supra* n.2, at 28 (listing as motivations behind implementation of diversity jurisdiction: desire to avoid regional prejudice against commercial litigants; desire to permit commercial interests to litigate controversies; and desire to achieve more efficient administration of justice for commercial class).

An issue of paramount interest to the framers of the Constitution,[10] the assurance of an impartial forum continues to be of serious concern to defendants, particularly corporate defendants.[11] For example, a 1992 study found that diversity jurisdiction was invoked in nearly two-thirds of the cases removed from state to federal court in one

[10] Alexander Hamilton explained:

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST. No. 80, *supra* n.2, at 478.

[11] Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 40 AM. U. L. REV. 369, 389 (Winter 1992) (funded by the State Justice Institute). There were 18,860 private party cases removed from state to federal court in fiscal year 1987. Of these, 5,902 were federal question cases and 12,598 were diversity cases. *Id.*

The study, conducted by the Institute for Law and Justice, analyzed cases from the database created by the Administrative Office of the United States Courts of all private party cases removed to federal district court for fiscal year 1987. (The year 1987 was selected because it was the most recent year for which a computerized database was available at the time the study commenced.) *Id.* at 388-89 and n.82.

year.[12] The typical removal case, whether based on diversity or federal question jurisdiction, involved an in-state individual plaintiff and an out-of-state corporation. The most prevalent actions were contract, tort and products liability cases (72% of all private party removal actions).[13]

Attorneys perceive that out-of-state business defendants are confronted with unfavorable bias in state courts.[14] In the 1992 study, anti-defendant-related bias was reported by 77.4% of defense counsel surveyed.[15] The most common bases for bias reported by defense counsel were out-of-state status (reported by 50.7%) and business/corporation status (44.8%).[16] These reports were corroborated by plaintiffs' attorneys, over half of whom surveyed (53.4%)

---

12 *See generally id.* Researchers for the Institute of Law and Justice randomly selected 600 cases from a universe of 18,860 private party removal cases filed in federal district court during FY 1987. They sent two survey mailings and followed up with telephone interviews. Survey questions focused on the presence of local bias directed against either party, the competency of the judiciary, procedural burdens, geographic convenience, and costs. *See id.* at 393-96.

13 *Id.* at 389.

14 *See id.* at 408-13. *See also* Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 99 (1980) (survey of 405 attorneys in the Chicago area found evidence of fear of local bias); *Note, The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965) (survey by law students in Virginia area found local bias a factor). *Cf. Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 260-64 (1978) (survey of 24 attorneys in two federal judicial districts in Minnesota inconclusive); Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962) (survey conducted on two federal judicial districts in Wisconsin did not find bias).

15 Miller, *supra* n.14, at 408-09.

16 *Id.*

said defendants faced unfavorable bias.[17] Plaintiff's counsel found out-of-state bias to be the most common (26.3%), followed by type of business (18%) and incorporated status (17.6%).[18] Reports by defense counsel of bias against out-of-state litigants were more prominent in diversity cases (56.3%) than in federal question cases (31.8%).[19]

Whether this perception is accurate is not relevant—in the area of "fairness," perceptions are more critical than reality. The perception of procedural fairness is the primary factor in litigants' attitudes toward the justice system, even more so than the actual outcome of a lawsuit. *See* E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 64-76, 94-98 (Plenum Press, ed. 1988) (discussing how procedures, events, and outcomes affect judgments of procedural fairness). The removal mechanism is designed to assuage the fears of litigants and promote confidence in the equitability of the justice system:

> However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled on other grounds, Louisville C. and C. R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). *See also Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1855) (Diversity jurisdiction is to "make people think and feel . . . that their relations to each other were pro-

---

17 *Id.* at 408-09.

18 *Id.* at 409. *See also id.* at 410-13.

19 *Id.* at 410.

tected by the strictest justice, administered in courts independent of all local control . . . .").

The congressional purpose for diversity jurisdiction is undermined by the receipt rule. By dispensing with service of process requirements, the rule creates notice problems that will lead defendants, particularly corporate defendants, to inadvertently waive removal rights. The service rule, on the other hand, preserves a defendant's ability to obtain an impartial forum through removal in accordance with the statute.

IV. THE RECEIPT RULE CREATES DUE PROCESS CONCERNS.

The right to an impartial decisionmaker is an "essential" constitutional right. *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970). As this Court has recognized:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jericho, 446 U.S. 238, 242 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (due process demands impartiality on part of those that function in judicial and quasi-judicial capacities). Congress granted defendants a mechanism to obtain access to federal courts through the removal process. By dispensing with the service of process requirement, the receipt rule chips away at the constitutional due process protections which allow defendants to exercise this right.

The notice problems created by the receipt rule violate due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded

> finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). By erecting artificial barriers to the federal courts, the receipt rule may prevent corporate defendants from receiving adequate notice that the removal period has been triggered.[20] As a result, these defendants will be permanently deprived of the opportunity to exercise their right to a federal forum without adequate notice that the right was even at risk.[21] This is improper; as Congress has chosen to create the right to an impartial federal forum and extend it to out-of-state defendants by way of the removal laws, abridging this right by adopting an interpretation of the rule that divests a defendant of this right without adequate notice is constitutionally flawed. *Goldberg*, 397 U.S. 254; *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The receipt rule also causes jurisdictional problems that violate due process guarantees. A defendant cannot have its rights abridged by a court that lacks personal jurisdiction over it. This "protects an individual's liberty interest in not being subject to the binding judgment of a forum with which he has established no meaningful contacts, ties or relations." *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985), *quoting International Shoe Co.*

---

[20] *See* Part II, *supra*.

[21] The fact that a defendant may waive its removal right does not mean that the right does not exist. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 243 n.31 (1973) (voluntary consent to search is not "an intentional relinquishment or abandonment of a known right or privilege."); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (statute requiring consent to waive certain speech rights to obtain federal funding does not void First Amendment free speech guarantees).

v. Washington, 326 U.S. 310, 319 (1945).[22] Service of process is a threshold requirement for a court to establish personal jurisdiction over a defendant. *Mullane*, 339 U.S. at 313. The ideals of "fair play and substantial justice" are controverted by an interpretation of § 1446(b) that allows a defendant to be permanently divested of its rights to litigate in a federal forum by a court lacking personal jurisdiction over that defendant. *See International Shoe*, 326 U.S. 310, 316 (1945). As a result of the conflicts with the due process clause, the interpretation of the statute that gives rise to the receipt rule should be rejected. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 507 (1979) (statute must be construed where possible to avoid constitutional conflicts).

Use of the service rule preserves the integrity of the federal courts. It ensures that service of process is completed before any of a defendant's rights are determined; it prevents a defendant's rights from being extinguished before it receives adequate notice or before it comes under the personal jurisdiction of a court. Adopting the service rule is consistent with the statute, its legislative purpose, and the demands of the Constitution.

---

[22] *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (affirming appeals court decision to vacate district court judgment as defendant was ". . . not named as a party, was never served and did not formally appear at the trial."); *Estin v. Estin*, 334 U.S. 541, 548 (1948) (Nevada court with no personal jurisdiction over respondent has no power to alter respondent's rights under New York law).

CONCLUSION

The judgment of the Court of Appeals should be reversed with instruction to reinstate the order of the district court.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191-1517
(703) 264-5300
Of Counsel

PATRICK W. LEE *
ROBERT P. CHARROW
LEAH LORBER
CHRISTOPHER J. MCGUIRE
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
* *Counsel of Record for Amicus Curiae Product Liability Advisory Council, Inc.*

December 1998

APPENDIX

APPENDIX

CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Aluminium Company of America
American Automobile Manufacturers Assn.
American Home Products Corporation
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Atlantic Richfield Company
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Inc., Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Celanese Ltd.
Chrysler Corporation
CLARK Material Handling Company
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
Corning Incorporated
Dana Corporation
Deere & Company
Digital Equipment Corporation
Dow Chemical Company, The
E. & J. Gallo Winery
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Exxon Corporation, U.S.A.
FMC Corporation
Ford Motor Company
Fortune Brands, Inc.
Freightliner Corporation
Gates Corporation, The; Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harnischfeger Industries Inc.

Heil Company, The
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Loewen Group International, Inc.
Lorillard Tobacco Company
Lucas Varity
Lucent Technologies Inc.
Mack Trucks, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Motor Coach Industries International, Inc.
Motorola, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O. F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The
Rheem Manufacturing
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck and Company
Shell Oil Company
Siemens Energy & Automation, Inc.
Smith & Nephew North America
SmithKline Beecham Corporation
Snap-on Incorporated
Sofamor Danck Group, Inc.
Solutia, Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Taylor Wharton Gas Equipment, A Division of Terex Corporation
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.

(10)

No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,
v.
MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, DC 20006

MARSHA S. BERZON
INDIRA TALWANI
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

31 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

FEDERAL

STATE

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

PUBLICATIONS

TABLE OF AUTHORITIES—Continued

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

The question in this case is whether, by a technical amendment to 28 U.S.C. § 1446(b), Congress abrogated the requirement that an individual named as a defendant in a state court lawsuit be served with a summons or other jurisdiction-invoking process before having to take action to remove the suit to federal court. The answer is "no."

As we show in Part I of our Argument, in both state and federal courts—and from the earliest years of the nation—putative defendants have been required to take action in a court *only* when informed in a formal, prescribed manner, directed in many instances at a predesignated representative or agent for purposes of service, that another party is invoking the court's jurisdiction and seeking to compel that individual to participate in court proceedings. While the precise form of the service of summons or other jurisdiction-invoking process varies from state to state, from state to federal courts, and within jurisdictions (according, for example, to the type of action at hand), the bedrock requirement that *some* formality, served in a specified manner upon specified individuals,

---

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

trigger the obligation to respond in some manner is a consistent *sine qua non* of judicial authority.

And, as we show in Part II of our Argument, this long-standing, bedrock requirement is critical to the statutory analysis this Court must perform. In light of the long-standing and fundamental role of service of summons, its abrogation may not be lightly implied, but must be compelled by the language and history of the statute. Here, neither the language nor the history could possibly compel this result. Read in context, the language can and must be given a meaning that respects, rather than abrogates, this basic procedural norm. And, the legislative history demonstrates that Congress had no interest in abrogating state court rules regarding service of summons. Instead, the 1949 Congress sought "uniformity" in the removal process only *after* service of summons or other jurisdiction-invoking process had occurred, and amended the removal statute to solve a problem—*viz.*, that the defendant served with a summons was not provided a copy of the complaint, and therefore had insufficient information on which to base the decision to remove—that arose in some jurisdictions *after* such service of summons.

ARGUMENT

In numerous instances lawsuits that could be filed in federal court can be, and are, filed in state court. The question in this case arises out of Congress' efforts to provide—through a "removal procedure" that can be initiated by the defendant in a state court lawsuit—for the adjudication in federal court of cases that come within the constitutional jurisdiction of the federal courts.

Congress' efforts, of course, have had to take account of the point that the rules for bringing a putative defendant into a lawsuit vary with jurisdiction, both from state to state and often, between any particular state court and the adjacent federal court (whose case initiation and party inclusion requisites are stated not in state law but in Federal Rules of Civil Procedure 3 & 4).

Because of that variance, in describing the time period for removing a case from state court to federal court, Congress has had a more difficult task than in describing the uniform rules that govern the time periods within which an individual named in a federal court complaint as a defendant must act to protect his rights.

In this regard the current removal provision reads as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. [28 U.S.C. § 1446(b)]

Looking at this provision in complete isolation, the Court of Appeals concluded that the provision can *only* be read as requiring that an individual named as a defendant in a removable state court civil action who (a) has *not* been served with a formal summons or other means of calling that individual within the jurisdiction of any court, but (b) is provided informally with a bare copy of a complaint, must file her notice of removal within 30 days of receiving the complaint.

The Court of Appeals so held although the consistent governing rule in the removal statutes before the pertinent 1949 amendment to 28 U.S.C. § 1446 was, to the contrary, premised on the basic principle of American jurisprudence that an individual becomes an active party to a lawsuit, required to take action to avoid legal jeopardy and protect her interests so as to avoid judgment against her, *only* upon formal service of a summons or similar

jurisdiction-invoking process. And the Court of Appeals so held although the 1949 change was drafted and enacted, as far as appears, *not* to alter that continuous rule of American law for removal cases, but to solve a modest, technical problem that arises in removal cases particularly—*viz.*, assuring that an individual who has been apprised through formal process that the plaintiff intends to pursue a judgment against that individual, and that he is therefore in legal jeopardy, need not take action to remove the case while still in the dark concerning information—the other parties and the precise nature of the causes of action—necessary to make a proper decision regarding removability.

It is our submission that § 1446, read in the context of the Judicial Code generally and of the Federal Rules of Civil Procedure—as well as in light of the prior removal procedure statutes and rules and the avowed purposes of the 1949 changes to those statutes and rules—could not have been intended to demand that an individual act protectively to assure his or her right to proceed in federal court on the possibility that she will later be served with summons and thus exposed to possible adverse judgment. *See* pp. 4-13, *infra* As the first step in making that submission, we survey briefly the background American jurisprudence on the critical role of service of summons. We demonstrate next that the statutory language does *not* mandate the abrogation of that critical role in removal cases but rather, together with the legislative history, confirms that Congress intended only a minor, technical amendment to resolve a problem that arises *after* service of process. *See* pp. 13-25, *infra.*

I. THE ROLE OF SERVICE OF SUMMONS IN AMERICAN CIVIL PROCEDURE.

A. Two related propositions regarding the function and effect of service of summons serve as the bedrock of our civil procedure system:

First, for both non-resident and resident defendants, there must be some formal process sufficient to bring the person before the court. Otherwise, the court lacks compulsory authority over the individual and there is no basis for requiring the putative defendant to take action to protect his procedural and substantive rights.

Second, a summons also serves a second and related role relating to the *in personam* jurisdiction of the court, namely, providing individuals named in the complaint as defendants with notice by prescribed means that a legal proceeding has been brought against the individual named as defendant and that the defendant must take certain responsive actions to protect and preserve his legal rights or face summary judicial action.

1. The notion that there must be some definite, formal means of calling an individual before a court through compulsory process derives, in the first place, from the venerable "proposition . . . embodied in the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present . . ." *Burnham v. Superior Court of California*, 495 U.S. 604, 609 (1990) (plurality opinion) (Scalia, J.). To paraphrase the Court in *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877), "if the court has no jurisdiction over the person of the defendant . . . [it has] no authority to pass upon his personal rights and obligations . . .[and] the whole proceeding, without service upon him or his appearance, is coram non judice and void . . ." *See also e.g.*, 4 C. Wright & A. Miller, Federal Practice and Procedure § 1063, p. 224 (2d ed. 1987) ("The concepts of subject matter jurisdiction and venue should be distinguished from the principle that the court must have jurisdiction over defendant's person, his property, or the res that is the subject of the suit.")

The summons is the modern means of asserting judicial authority with regard to a person who has not himself or herself invoked that authority by filing an action; a sub-

stitute, in effect, for asserting directly the "physical power" of the court. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).[2] Under the common law, an individual was compelled to defend an action by the writ of *capias ad respondendum*, which commanded the sheriff to take physical control over the defendant and keep custody of him so that he may answer the plaintiff in the action. Black's Law Dictionary 208 (5th ed. 1990); *see also* 1 J. Moore Federal Practice ¶ 0.6 [2-2] (2d ed. 1995); 3 W. Holdsworth, *A History of English Law* 626 (5th ed. 1942); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). The summons replaced that writ. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). It, too, was traditionally directed to the sheriff or other proper officer, but, rather than requiring the physical seizure of the putative defendant, required the sheriff to notify the person named that an action has been commenced against him in the court from which the summons issued, and that the person had to appear on the day named to answer the complaint against him. Black's Law Dictionary 1436 (5th ed. 1990).

While the person served was no longer arrested, the summons served to compel the defendant to appear in court. Consequently, "[b]efore a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. '[S]ervice of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party

[2] Justice Holmes noted in *McDonald* that "[t]he foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 [(1913)] . . . ; Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co [243 U.S. 93 (1917)]. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind." 243 U.S. at 91.

served.' " *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946)).

The function of the summons as an expression of the authority of the court in compelling the defendant to respond or lose procedural or substantive rights is one that depends on manner as well as content, and, as such, is distinct from, and in addition to, a requirement that the defendant be notified of the action.

This Court has expressly so recognized. In determining the prerequisites to a court's exercise of *in personam* jurisdiction, the Court explained that "before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons," and the procedural requirement of actual service of process must be satisfied. *Omni Capital Int'l, supra*, 484 U.S. at 104.[3]

As Federal Rule of Civil Procedure 4 indicates, a formal, properly served summons continues to be required in modern jurisprudence as the *sine qua non* before an individual is considered a party to litigation and required to participate or forego procedural or substantive rights. Rule 4 specifies that "[a] summons, or copy . . ., shall be issued for each defendant to be served," and that the "*summons shall be served* together with a copy of the complaint." Rule 4 (b), 4(c)(1) (emphasis added). Service of the summons is required except where the defendant waives the service; the formal requirements for such service are set forth in

[3] In *R. H. Hassler, Inc. v. Shaw*, 271 U.S. 195, 198-199 (1925), for example, an out-of-state defendant received a copy of a summons and complaint and thus was notified of the state court proceeding, but there was *no valid service of process*. The *Hassler* Court concluded that the state court's judgment was void for lack of service of process.

paragraphs (e)-(i) of the Rule. State courts have similar rules requiring service of the summons.[4]

2. The second function of service of summons in a civil suit developed later, and reflects the requirement of the due process clause of the Fourteenth Amendment that a defendant have proper notice of the instigation of an action against him so that he may appear to protect his rights. Such notice must be

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (citations omitted).]

This fundamental, mandatory notice that the individual must respond—and of the consequences of not responding—is now generally satisfied through service of summons which, as this Court has explained, is "a formal delivery of documents that is legally sufficient to charge the defend-

[4] *See, e.g.*, Ala. Rule Civ. Proc. 4 (1998); Alaska Rule Civ. Proc. 4 (1998); Ariz. Rule Civ. Proc. 4 (1998); Ark. Rule Civ. Proc. 4 (1998); Cal. Civ. Proc. Code §§ 410.50, 412.20, 415.10 (Deering 1998); Colo. Rule Civ. Proc. 3 (1998); Del. Super. Ct. Civ. Rule 4 (1998); D.C. Super. Ct. Civ. Rule 4 (1998); Fla. Rule Civ. Proc. 1.070 & Form 1.902 (1998); Haw. Rule Civ. Proc. 4 (1998); Idaho Rule Civ. Proc. 4 (198); Ky. Rule Civ. Proc. 4 (1998); Me. Rule Civ. Proc. 4 (1998); Md. Ct. Rule 2-121 (1997); Mass. Rule Civ. Proc. 4 (1998); Mich. Ct. Rule 2.108 (1998); Miss. Rule Civ. Proc. 4 (1998); Mont. Code Ann., ch. 20, Rule 4D (1997); Nev. Rule Civ. Proc. 4 (1998); N.M. Dist. Ct. Rule Civ. Proc. 1-0004 (1997); N.C. Gen. Stat. § 1A-1, Rule 4 (1997); N.D. Rule Civ. Proc. 4 (1997); Ohio Rule Civ. Proc. 4 (1998); Or. Rule Civ. Proc. 7 (1996); R.I. Rule Civ. Proc. 4 (1997); S.C. Rule Civ. Proc. 3, 4 (1998); Tenn. Civ. Proc. Rule 4.01 (1998); Utah Rule Civ. Proc. 3, 4 (1998); Vt. Rule Civ. Proc. 4 (1997); W. Va. Rule Civ. Proc. 4 (1997); Wis. Stat. § 801.02 (1997); Wyo. Rule Civ. Proc. 4 (1997).

ant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (citing, *inter alia*, Black's Law Dictionary 1227 (5th ed. 1979), and 4 C Wright & A. Miller, Federal Practice and Procedure § 1063, p. 225 (2d ed. 1987)).

Again, Rule 4 illustrates the modern-day role of a summons in notifying the defendant when and where he must respond, and the consequences of not responding. Thus, in federal court, the summons "shall state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint." [5] State court requirements for a summons require similar information. *See* n.4, p. 8, *supra*.

Although due process does not specify that notice must be in the form of a summons (cf. *Mullane*), it is plain that the proper notice requirement *is not* satisfied by an initial pleading setting forth a claim for relief alone. Such a pleading, standing by itself, does not inform a party of whether the plaintiff will take the steps to obtain the jurisdiction of the court over the individual (which as noted above, requires service of the summons), and thus does not provide sufficient information to the putative defendants regarding "the pendency of the action," their "opportunity to present their objections" or the time within which "those interested [must] make their appearance." Without such notice, an individual named in the complaint as a

[5] *See also* the form Summons set forth in the Appendix of Forms to the Federal Rules of Civil Procedure which notifies the defendant that he is:

> hereby summoned and required to serve upon ————, plaintiff's attorney, whose address is ————, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Form 1, Summons, Appendix of Forms (footnote omitted).

defendant does not have legally adequate information to impress on her the necessity to consult counsel and to seek to assert her position in the manner most calculated to result in a court judgment favorable to her—including, where the substantive prerequisites are met, removing the case from state to federal court as specified in the federal statutes and rules.[6]

B. At all times before 1949, service of a summons or other jurisdiction-invoking process was a prerequisite to the accrual of the limitations period for removing a case from state court to federal court. Commentator Henry Campbell Black summarized this early history in an 1898 treatise:

> The removal act of 1887 provides that when the removal of a cause is sought on the ground of local prejudice, the removal may be made "at any time before the trial thereof." But in all other cases the petition for removal must be made and filed "at the time, or any time before, the defendant is required by the law of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. . . ." Under the original judiciary act of 1789, the petition was required to be filed "at the time of entering his appearance in the state court." Under the local prejudice act of 1867, the application was to be made "before the trial or final hearing of the suit." Under the

[6] It is worthy of note that under the Eleventh Circuit's construction of 28 U.S.C. § 1446, receipt of the complaint informally by the nonlawyer party named in the complaint would suffice to trigger the removal limitations period; indeed, where no service of summons has occurred and the putative defendant therefore has not appeared through counsel, it is difficult to see how receipt by the attorney but not the party herself could satisfy the rule. Additionally, where a party named as a defendant is not a natural person, the absence of a summons upon the party's proper representative may compromise the notices of the summons by compromising the party's means of assuring that the papers served will be transmitted to the individuals in the organization authorized to respond to lawsuits.

> act of 1875, the defendant was to file his petition "before or at the term at which said cause could be first tried and before the trial thereof." [H. Black, *Dillion on Removal of Causes* (1898 § 151).]

Similar provisions were contained in the Judicial Act of 1911, ch. 231, 36 Stat. 1087, 1095, 1097.

Thus, former 28 U.S.C. § 72, for example, provided that a petition for removal was required to be filed "at any time before the defendant is required by the laws of the State or rule of the State court in which such suit is brought to answer or plead." Former § 74 and § 75 in turn provided for the filing of a removal petition at any time "before trial or final hearing" in civil rights cases and cases involving revenue officers, court officers and officers of either House. 28 U.S.C. §§ 72, 74, 76 (1940 ed.); *see also* H.R. Rep. No. 2646, 79th Cong., 2d Sess., A130 (1946), *reprinted in* 1A B. Reams, & C. Haworth, Congress and the Courts: A Legislative History 1787-1977 815 (1978) (hereinafter Congress and the Courts).

As enacted in 1948 as part of a revision of the entire judicial code, 28 U.S.C. § 1446(b) stated that "[t]he petition for removal of a civil action or proceeding may be filed within twenty days after the commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948). Thus, section 1446(b), as originally enacted, explicitly maintained the historical role for service of process.

Prior to 1949, then, an individual named in a state lawsuit complaint as a defendant could wait to remove, as he could wait to respond to the complaint in any other manner, until (1) the plaintiff took the necessary steps to indicate that the plaintiff intended to pursue the suit to judgment against that particular individual; and (2) the individual had received notice of the suit sufficient to meet the due process requirements of the Fourteenth Amendment.

C. The Eleventh Circuit's decision necessarily assumes that this procedural scheme, with its deep historical roots, was discarded entirely through a 1949 corrective amendment to the 1948 comprehensive code revision. For, as we have stressed, under that court's decision, the time to remove can run *before* a plaintiff has taken any steps to pursue his state court lawsuit against a putative defendant beyond naming him in, and providing him with, a complaint, and *before* the putative defendant has received the formal notice reasonably calculated to apprise him of the pendency of the lawsuit and to afford him an opportunity to present his objections.

Against this background, the question in this case is whether Congress *sub silentio,* by a technical 1949 amendment, eliminated its heretofor consistent insistence that the decision to remove was subject to the same procedural prerequisites, for the same reasons, as any other action required of a putative defendant in a lawsuit.

And an affirmative answer to the question, as given by the Eleventh Circuit, necessarily entails the conclusion that in the removal context alone, of all legal contexts of which we are aware, Congress intended to require that an individual take action or lose procedural rights *before* being properly made a party defendant in a lawsuit and before being notified through service of summons that the plaintiff intends to pursue judgment against the putative defendant in court.

Any such conclusion, we believe, could be reached only if Congress' intent to so legislate were unmistakable. For where, as here, "we are dealing with . . . a background of several hundred years of history . . . departure from that long tradition . . . should [not] be lightly implied," unless "the history or the language of the [statute] compels[s] it." *Hecht v. Bowles*, 321 U.S. 321, 329-30 (1944). *See also Tenney v. Branhove*, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before

us"). *See also Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). As we show in Part II, there is no such compulsion here.

II. THE REMOVAL STATUTE AT ISSUE.

The rule articulated by the Court of Appeals represents a major departure from a long tradition well grounded in history and reason. Neither the language of the statute nor the legislative history can support such a reading. Instead, the 1949 amendment had a considerably more modest purpose, as a reading of that provision against the historical background, in the context of related statutes and rules, and in light of extremely clear legislative history, demonstrates.

A. In concluding that the removal statute had a plain meaning, the Eleventh Circuit's analysis "[b]y and large . . . begins and ends with . . . three words": "*receipt* . . . through service *or otherwise.*" *Michetti Pipe Stringing v. Murphy Bros.*, 125 F.3d 1396, 1397-98 (11th Cir. 1997) (emphasis in original). But, while the "starting point is the language of the statute," *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), in expounding a statute, the court " 'must not be guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *United States National Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (same).

Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). And, when placed in context, the language of § 1446(b) is most fairly read as providing that the removal period begins

only after the defendant has been served with a summons *and* provided with a copy of the complaint.

1. Even viewed in isolation, the clause on which the Eleventh Circuit focused to the exclusion of everything else can be sensibly read as stating that the removal time runs from the receipt of the complaint whether the complaint is delivered along with the "service" of summons or separately—*viz.*, as resting on the premise that the bedrock requirement that there be such formal service of jurisdiction-invoking process has been fulfilled. "[R]eceipt . . . by service or otherwise," that is, can be understood to mean either "receipt along with the service of summons" —as was contemplated by state rules that were analogous to Federal Rule of Civil Procedure 4 ("(c) A summons shall be served together with a copy of the complaint")— or "receipt apart from and after the service of summons," as was the practice in some jurisdictions. Under either alternative, service of summons is still contemplated.

It is very much to the point in this regard that the rest of the sentence from which the quoted language is drawn supports the interpretation that service of a summons is required. The next clause sets forth an alternative time period, *viz.*, from the time of service of the summons, where the initial pleading has been filed in court and is not required ever to be served on the defendant. 28 U.S.C. § 1446(b). Given this provision, § 1446(b) is most rationally read as mandating that in all situations, —regardless of whether the complaint is filed or served or simply provided—the bedrock requirement of service of the summons also must be fulfilled.

2. The meaning of § 1446(b) is further illuminated by considering, in the context of the statute as a whole, the use of the word "defendant" in § 1446(b) to designate the person who may remove an action.

The question of who is a "defendant" for removal purposes frequently arises in the case of multiple defendants.

As a general rule, all defendants who may properly join in the notice of removal must join. *Gableman v. Peoria, D. & E. R.R.*, 179 U.S. 335 (1900); *Chicago, R.I. & P. R.R. v. Martin*, 178 U.S. 245 (1900). But a non-resident defendant who has not been served may be ignored, and need not be joined for purposes of removal. *Pullman v. Jenkins*, 305 U.S. 534 (1939). Thus, the *unserved*, non-resident party is treated as if he is not a "defendant" at all.

The *Pullman v. Jenkins* rule is reflected in the language of § 1441(b), delineating the requirements for removal based on diversity of citizenship. Section 1441(b) provides that a diversity action "shall be removable only if none of the parties in interest properly joined *and served* as defendants is a citizen of the State in which such action is brought." (Emphasis added). This choice of words clearly differentiates "parties in interest" and individuals who have been brought into an action through formal service, and terms the latter, but not the former, "defendants."

Reading "defendant" as used in § 1446(b) consistently with "defendant" as used in § 1441(b) strongly supports the conclusion that § 1446(b) is addressed only to named individuals who have been served with summons, and not to individuals named in a complaint as defendants but never brought into the proceeding through service of summons.[7]

---

[7] The § 1441 description of a removal action as one "*brought* in a State court" (emphasis added) also illustrates that § 1446(b) cannot be read as the Court of Appeals read it. No single standard exists under state law, or existed when § 1446 was drafted, regarding when an action is brought or commenced.

A survey conducted when Rule 3 was being formulated in 1938, reported the number of states which had adopted various methods for determining the commencement of actions (some states had alternative methods) as follows:

3. Finally, any conclusion as to the meaning intended by the drafters of 28 U.S.C. § 1446(b) must take into account the use of all but identical language in Federal Rule of Civil Procedure 81(c).[8] *Cf. C.J.R. v. Lundy*, 516 U.S. 235, 250 (1996).

Rule 81(c) states that

> [i]n a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules *within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based*, or within 20 days after service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. [Emphasis added].

Construing "receipt . . . through service or otherwise" in Rule 81(c), consistently with the Eleventh Circuit's construction of the same language in § 1446(b)—*viz.*, to mean that no service of process is required before the

---

(1)	filing a complaint	14 states;
(2)	praecipe	3 states;
(3)	service of summons	21 states;
(4)	filing a complaint or service of summons	4 states;
(5)	filing a complaint and causing a summons to issue thereon	8 states;
(6)	[in certain actions] notice and motion of judgment	2 states.

1 J. Moore, Federal Practice ¶ 3 App. 100, n.2 (3d ed. 1998).

In no jurisdiction—then or now—is an action commenced by simply providing a putative defendant with a copy of the complaint.

[8] As we show later (at pp. 20-24, *infra*), § 1446(a) and Rule 81(c) were drafted contemporaneously and meant to be read consistently.

defendant is required to answer—creates a major jurisdictional problem. Since, by the Eleventh Circuit's hypothesis, the state court had no jurisdiction over the person, the federal court will also have no jurisdiction over the person.[9] And, requiring the "defendant" nonetheless to respond to the complaint, even though he was never formally served and brought into the case and put within any court's jurisdiction, would compel him to act or else subject himself to judgment, in violation of the most fundamental principles of civil procedure. *See* pp. 5-10, *supra*.

Indeed, such a construction of Rule 81(c) would directly conflict with Federal Rule of Civil Procedure 12, which provides that "a defendant shall serve an answer within 20 days after being served with the summons and complaint . . . ."[10]

---

[9] The federal court does not obtain jurisdiction over an unserved defendant simply because he appears to remove the case. *Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing *Freeman v. Bee Machine Co.*, 313 U.S. 448, 449 (1943); *Minnesota v. United States*, 305 U.S. 382, 389 (1939); *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 382 (1922)); *see also Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 406, 409 (1929) (objection to the court's jurisdiction over the person of respondent not waived by removal); *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("[a] want of jurisdiction in the state court is not cured by the removal").

[10] Nor can an individual named in the complaint as a defendant rely on the second clause of Rule 81(c) to wait after removal for service of the summons before responding. The Supreme Court Explanatory Note regarding the 1948 amendment of subdivision (c) makes clear that that portion of the Rule applies to those states where the defendant may never receive a copy of the initial pleading. *See* pp. 20-21, *infra*. Courts that have considered the contention that a defendant, who has not yet been served with summons, can rely on the second clause of Rule 81(c) in order to avoid filing a responsive pleading, have rejected it. *See, e.g. Silva v. City of Madison*, 69 F.3d 1368, 1375 (7th Cir. 1996) ("[A]lthough the plain language of Rule 81(c) can be read to apply all three time periods set forth in the rule to all removal cases, this in-

B. The legislative history of 28 U.S.C. § 1446(b) as amended in 1949 and the related Federal Rule of Civil Procedure 81(c), reveal an intent to preserve the varied state court rules for commencement of an action and service of process, while at the same time seeking some uniformity as to the period for removal *after those conditions are met*. Moreover, there is in the history no indication whatever that Congress meant to sacrifice the time-honored rule that it is service of summons that triggers any and all obligations of a putative defendant to take action in a lawsuit or forego rights to the need for administrative consistency.

The Eleventh Circuit was thus entirely wrong in treating the legislative history of § 1446(b) as consistent with its reading of the section's language on the ground that the history purportedly indicates that Congress wanted "to make practice identical from state to state." 125 F.3d at 1399. The Eleventh Circuit's supposition that the goal was total uniformity is a gross oversimplification of the goals of the 1948 legislation and a complete misstatement of the purposes of the 1949 legislation.

1. (a) Prior to the 1948 amendment to the Judicial Code, the federal removal statutes, although they had varied in other respects, had uniformly permitted a putative defendant to await service of process before removing the action. *See* pp. 10-11, *supra*. At the same time—that is, before 1948—Federal Rule of Civil Procedure 81(c) provided in relevant part that:

---

terpretation is not compatible with the intent of the drafters of either § 1446 or Rule 81. It is clear that the second time period was not intended to apply in a state in which, when service is effected, the complaint is served along with the summons. . . . Thus, because only the first and third time periods in Rule 81(c) apply to the City, the City was required to file a responsive pleading within the later of twenty days after receipt of the complaint 'through service or otherwise' or five days after removal"); *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 143 (9th Cir. 1975) ("[W]e conclude that the second clause of rule 81(c) applies only to cases arising in states which do not require service of both a summons and complaint").

> In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States whichever is longer. [Fed. R. Civ. P. 81(c) (1937), *reprinted in* 14 J. Moore, Federal Practice, ¶ 81 App. 0-[1]] (3d ed. 1998).]

Thus, the pre-1948 Rule, like the contemporaneous statutory provisions, contemplated that there would be service of process before a putative defendant is compelled to present his defenses to an action.

Rule 81(c) was amended in 1946 by adding the phrase "but in any event within 20 days after the filing of the transcript." 14 J. Moore, *supra* § 81 App. 014[3]. The purpose of this amendment was to prevent certain delays by a defendant in interposing his answers or presenting his defenses. Committee Note of 1946, *reprinted in* 14 J. Moore, *supra*, § 81 pp. 03[2]. The Rule was, to be sure, a first step towards "uniformity" in the removal practice but notably, that "uniformity" only addressed the practice *after* service of process, not before.

(b) The 1948 revision of the Judicial Code resulted in the substitution of a single procedural provision in place of the various provisions previously in place. Thus, 28 U.S.C. § 1446(b), as originally enacted, provided that "[t]he petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948).

The House Report accompanying the proposed Judicial Code revision explains that "[a]s thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction." H.R. No. 308, 80th Cong., 1st Sess. (1947) at A135, *reprinted in* 1B Congress and the Courts, *supra*, at 1459. Like the 1946 amendment to

Rule 81(c), however, the "uniform" operation of the statute quite obviously went only to the time *after* service of process and the commencement of the action under state law; no attempt was made to eliminate the variation in state laws concerning the means and timing of service of process.[11] The statute therefore "operate[d] uniformly" only in the sense that uniform procedure for removal *after* service of process and commencement of the action was assured.

2. After the Judicial Code was amended in 1948, the Judicial Conference of the United States directed its Committee on Revision of the Judicial Code ("Judge's Committee"), headed by Circuit Judge Albert B. Maris, to continue to work on the revisions. S. Rep. 303, 81st Cong., 1st Sess., (1949) at 2, *reprinted in* 1949 U.S. Code Cong. & Admin. News 1248, 1248. That Committee addressed to all federal judges an inquiry requesting "that any ambiguities and errors which had been discovered in revised titles 18 and 28" be brought to its attention, *but cautioned that "no substantive changes could be considered in a correction bill." Id.* (emphasis added). Additionally, the Advisory Committee on the Federal Rules of Civil Procedure made suggestions to the Committee to harmonize the Civil Rules with Title 28. Based on both sets of suggestions, the Judge's Committee proposed an amendment to § 1446(b). *Id.*

(a) The Advisory Committee on the Federal Rules explained the sole concern that gave rise to the 1949 amendment to § 1446(b), and the concommitant amendment to Rule 81(c):

---

11 The Eleventh Circuit cites this page of House Report No. 308 for the proposition that "the stated intent for the 1948 amendments was to make practice identical from state to state." 125 F.3d at 1399. But it was obviously beyond the authority of Congress to dictate to the states concerning their rules of civil procedure. And, then as now, the timing and method of commencement of actions and service of process varied from state to state. Thus, "identical" practice or timing could not have been Congress' goal.

> [S]ubsection (b) [of § 1446] gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." [Advisory Committee Note of 1948, *reprinted in* 14 J. Moore, Federal Practice ¶ 81 App. 04[2] (3d ed. 1998).]

Both Committees, then, were only seeking to cure a technical defect of the earlier provision as applied to some states, by assuring that in those states the defendant had sufficient information to make an informed decision about removal.

So as to harmonize the Rules with the proposed statutory amendment, the Advisory Committee proposed that Rule 81(c) also be amended to state that in a removed action, a defendant shall answer or present the other defenses available to him within "20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth claim for relief upon which the action or proceeding is based, or within 5 days after the filing of the petition for removal, whichever period is longer." Advisory Committee's Proposed 1948 Amendment, *reprinted in* 7 J. Moore, Federal Practice ¶ 81.01[17] (2d ed. 1995). The Advisory Committee explained that this revised language "is geared to th[e] proposed statutory amendment; and gives the defendant at least 5 days after removal within which to file his defenses." Advisory Committee Note of 1948, *reprinted in* 14 J. Moore, Federal Practice, ¶ 81 App. 04[2] (3d ed. 1998).

This Advisory Committee note and these initial proposed amendments to 28 U.S.C. § 1446(b) demonstrate the following points:

First, the post-1948 Judicial Code amendments to § 1446(b) and to Rule 81(c) were proposed as parallel changes to address the same problem, and the language of the section and the rule must be construed consistently. If "receipt [of the complaint] by service or otherwise" somehow abrogates the need for jurisdiction-invoking service of process, that abrogation must apply in both situations—removal and answer. *See* pp. 16-17, *supra.*

Second, nothing in the Advisory Committee Notes suggest that the drafters anticipated that the amendment could possibly have the effect of abrogating the fundamental rule that formal service of process is always necessary to bring a named party into a lawsuit as a party and to require him to respond or else suffer legal consequences. Rather, the purpose of the amendments was to address a narrow problem that arose in certain jurisdictions "*where an action* [*is*] *both commenced and service of process made.*" *Id.* (emphasis added).

(b) Before the amendments to Rule 81(c) were adopted, the Supreme Court made one additional change in the Rule. As the Court explained:

> The phrase, "or within 20 days after service of summons upon such initial pleading, then filed," was inserted following the phrase, "within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based," because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of court, thus he may never receive a copy of the initial pleading. The added phrase is intended to give the defendant 20 days after service of such summons in

> which to answer in a removal action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20 day period does not begin to run until the pleading is actually filed. [Supreme Court's explanatory Note regarding the 1948 amendment of subdivision (c), *reprinted in* 7 J. Moore, Federal Practice, ¶ 81.01[19] (2d ed. 1995).]

Rule 81(c), as amended, was adopted in December, 1948.

In May, 1949, Congress amended 28 U.S.C. § 1446(b) so as to conform to the Supreme Court's Advisory Committee note. As explained in the House Committee Report:

> Subsection (b) of section 1446 . . . has been found to create difficulty in those States, such as New York, where *suit is commenced by the service of a summons* and the plaintiff's initial pleading is not required to be served or filed until later.
>
> The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.
>
> This provision, however, without more, would create further difficulty in those States . . . where *suit is commenced by* the filing of plaintiff's initial pleading and the issuance and *service of a summons* without any requirement that a copy of the pleading be *served upon or otherwise furnished to the defendant.* Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.
>
> Th[is] paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure . . . adopted by the Supreme Court on December 29, 1948 . . . .

H.R. Rep. 352, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S. Code Cong. & Admin. News 1254, 1268 (emphasis added).[12]

Again, the legislative history is significant in two critical respects:

First, Congress viewed the language "receipt by service or otherwise" to address the problem where a defendant who had been served with process had not received the complaint; the solution was that he "need not file" until after he does receive the complaint. As numerous courts that have examined this legislative history have concluded, "[t]his change was intended to *expand* the removal period . . .," not to contract it. *Thomason v. Republic Ins. Co.*, 630 F. Supp. 331, 333 (E.D. Cal. 1986) (emphasis added); *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990); *Love v. State Farm Mut. Auto. Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982).

Second, nothing in the House or Senate Report or the Supreme Court Advisory Committee notes suggests any intention whatever to eliminate the prior requirement that service of process was required. Moreover, the change in the language was directed particularly at two states—New York and Kentucky—where, according to the reports themselves, service of process was required to commence the action. Since an action is not removable until it has been commenced, this is further confirmation that Congress started from the premise that service of process would occur before removal under the new 28 U.S.C. § 1446(b) or under the old.

[12] *See, also* S. Rep. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 1248, 1254 ("[i]n some States suits are begun *by the service of a summons or other process* without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant *is not required to file* his petition until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for.") (emphasis added). Since the intent was to address the same problem, the minor differences in language between the Rule and the statute presumably came about because the Supreme Court's draft was less than clear.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit remanding this case to state court should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, DC 20006

MARSHA S. BERZON
INDIRA TALWANI
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 833-9340

* Counsel of Record